Nov 5. 1-406 Judge Davis
Argued. P.S.
Submitted. D.E. —

Affirmed unanimously

Jno Hunt —

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~243.~~ 33

WILLIAM H. SCUDDER, PLAINTIFF IN ERROR,

vs.

THE UNION NATIONAL BANK, OF CHICAGO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED OCTOBER 14, 1873.

Smeltzer 107 1 18 How. 246
7 Ency Volume 194
1 3 Hill 411 3 97
107 Mass 137

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms, in the city of Chicago, in district aforesaid, before the judges thereof, on Monday, the twenty-fourth day of March, in the March term of said court, in year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

THE UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames, Hudson C. Carkner, and James L. Pierce. } 10233. Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, on the fourteenth day of February, A. D. eighteen hundred and seventy-two, the Union National Bank of Chicago, plaintiff, by Fuller and Smith, its attorneys, filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its præcipe for a writ of summons against Catherine Ames, William H. Scudder, Hudson C.
2 Carkner, and James L. Pierce, defendants; and also, at the same time, filed its bond for costs in said entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of said northern district.

THE UNION NATIONAL BANK OF CHICAGO, plaintiff,
vs.
CATHERINE AMES, WILLIAM H. SCUDDER, Hudson C. Carkner, James L. Pierce, defendants. } Assumpsit.

The clerk of said court will please issue a summons in the above-entitled cause, returnable to the next term of said court. Ad damnum, $10,000.

FULLER & SMITH,
Pl'ff' Sol'rs.

CHICAGO, *Feb.* 14, 1872.

(Endorsed:) Filed Feb'y 14, 1872. W'm H. Bradley, cl'k.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, A. D. 1871.

3 THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES & OTHERS. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay

all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this 14th day of February, A. D. 1872.

FULLER & SMITH.

(Endorsed:) Filed Feb'y 14th, A. D. 1872.
W'M H. BRADLEY, *Clerk.*

On this day, to wit, the 14th day of February, A. D. 1872, a writ of summons issued against said defendants in said entitled cause, which said writ, together with the return of the marshal thereto, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, *ss.*

The United States of America to the marshal of the northern district of Illinois, greeting:

4 We command you to summon Catherine Ames, William H. Scudder, Hudson C. Carkner, and James L. Pierce, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto the Union National Bank of Chicago of a plea of trespass on the case, upon promises to its damage, as it alleges, of ten thousand dollars; and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 14th day of February, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the 96th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

I served the within summons by reading the same to and in the presence and hearing of William H. Scudder, therein named, on the 14th day of Feb'y, A. D. 1872.

I did not serve Catherine Ames, Hudson C. Carkner, and James L. Pierce, being unable to find them within my district.

B. H. CAMPBELL,
U. S. Marshal,
By AUG. S. CAMPBELL,
Deputy.

(Endorsed:) Filed March 1st, A. D. 1872. W'm H. Bradley, clerk.

5 On this day, to wit, the 4th day of March, A. D. 1872, said defendant Scudder filed in said clerk's office his motion in said entitled cause, which said motion is in words and figures following, to wit:

Motion to quash.

In the circuit court of the United States for the northern district of Illinois.

THE UNION NATIONAL BANK OF CHICAGO, plaintiff,
vs.
CATHERINE AMES, WILLIAM H. SCUDDER, Hudson Carkner, and James L. Pierce, defendants.

And now comes William H. Scudder, one of the defendants in the above-entitled cause, in his own proper person, and entering his appearance for the purpose of making this motion, and for that purpose only, moves that the service of the writ of summons issued in the above-entitled cause, and made upon him on the 14th day of February, A. D. 1872, and the return of said service on said writ, be quashed and set aside, for the following reasons:

1st. Because a suit brought by said plaintiff against said defendants, and involving the same subject-matter, was commenced long before the commencement of the above-entitled suit, and was, at the time of
6 the service of said writ, and still is, pending in the circuit court of the United States for the districts of Missouri.

2d. Because said service was made on this defendant while he was attending the taking of depositions, taken at the instance of said plaintiff, in another suit now and then pending between said parties.

3d. Because this defendant was enticed within the jurisdiction of this court by the said plaintiff for the purpose of obtaining service of said writ upon him.

4th. Because this defendant was induced to come within the jurisdiction of this court by notice served upon him and signed by the attorneys of said plaintiff, which notice was given on the part of said plaintiff, its officers, its agents or attorneys, or some of them, with the purpose and intent of bringing this defendant within the jurisdiction of this court, in order to obtain upon him the service of a writ issued out of or to be issued out of this court.

5th. Because improper means were used by said plaintiff, its officers, agents, or attorneys, or some of them, to induce this defendant to come within the jurisdiction of this court and the marshal of the United States for the northern district of Illinois, that the service of a writ of summons might be made upon him.

W. H. SCUDDER.

7 Sworn to and subscribed before me this 20th day of February, A. D. 1872.

[SEAL.] EDWARD P. McCARTNEY,
Notary Public, St Louis County, Missouri.

(Endorsed.) Filed March 4, 1872. W'm H. Bradley, cl'k.

On this day, to wit, the 7th day of March, in the March term, A. D. 1872, of said court, in the record of the proceedings thereof before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Motion to quash heard.

THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES ET AL. } Assumpsit.

Now comes the plaintiff, by its attorney, and now comes also the defendant, William H. Scudder, by his attorney, and thereupon comes on to be heard the motion of said defendant upon affidavits filed to quash and set aside the service and return of the writ of summons heretofore issued herein, and after hearing the arguments of counsel the court takes the same under advisement.

Afterwards, to wit, on the 3d day of April, in the March term, A. D. 1872, of said court, in the record of the proceedings thereof, in said entitled cause, before the said the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

8 *Motion to quash overruled.*

THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES ET AL. } Assumpsit.

The court having considered and being now fully advised upon the motion of the defendant, William H. Scudder, to quash and set aside the service and return of the writ of summons herein, overrules the same, to which ruling the said defendant, by his attorney, excepts.

9 On the hearing of said motion the following exceptions to the ruling of the court were taken and were allowed by the court and made of record, and are in the words and figures following, to wit:

Exceptions to ruling on motion to quash.

In the circuit court of the United States for the northern district of Illinois.

THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES, WILLIAM H. SCUDDER, James L. Pierce, and Hudson C. Carkener.

Be it remembered that on Monday the 4th day of March, A. D. 1872, being the return-day of the March term, A. D. 1872, William H. Scudder, one of the defendants in the above-entitled cause, filed his motion in said cause, which is in words and figures following, to wit:

Motion to quash.

In the circuit court of the United States for the northern district of Illinois.

THE UNION NATIONAL BANK OF CHICAGO, plaintiff,
vs.
CATHERINE AMES, WILLIAM H. SCUDDER, Hudson C. Carkner, and James L. Pierce, defendants.

10 And now comes William H. Scudder, one of the defendants in

the above-entitled cause, in his own proper person, and entering his appearance for the purpose of making this motion, and for that purpose only, moves, that the service of the writ of summons is suedin the above-entitled cause, and made upon him on 14th day of February, A. D. 1872, and the return of said service on said writ, be quashed and set aside, for the following reasons:

1st. Because a suit brought by said plaintiff against said defendants, and involving the same subject-matter, was commenced long before the commencement of the above-entitled suit, and was at the time of the service of said writ and still is pending in the circuit court of the United States for the district of Missouri.

2. Because said service was made on this defendant while he was attending the taking of depositions, taken at the instance of said plaintiff in another suit, now and then pending between said parties.

3. Because this defendant was enticed within the jurisdiction of this court by the said plaintiff for the purpose of obtaining service of said writ upon him.

4th. Because this defendant was induced to come within the jurisdiction of this court by a notice served upon him and signed by the attorneys of said plaintiff, which notice was given on the part of said plaintiff, its officers, its agents or attorneys, or some of them, with
11 the purpose and intent of bringing this defendant within the jurisdiction of this court, in order to obtain upon him the service of a writ issued out of or to be issued out of this court.

5th. Because improper means were used by said plaintiff, its officers, agents, or attorneys, or some of them, to induce this defendant to come within the jurisdiction of this court and the marshal of the United States for the northern district of Illinois, that service of a writ of summons might be made upon him.

W'M H. SCUDDER.

Sworn to and subscribed before me this 26th day of February, A. D. 1872.

[NOTARIAL SEAL.] EDWARD P. McCARTY,
Notary Public, St. Louis County, Missouri.

(Endorsed:) Filed March 4, 1872. W'm H. Bradley, cl'k.

And in support of said motion said Scudder filed the following affidavit and transcript:

Affidavit of Scudder.

In the circuit court of the United States for the northern district of Illinois.

THE UNION NATIONAL BANK OF CHICAGO, PLAINTIFF,
vs.
CATHERINE AMES, WILLIAM H. SCUDDER, HUDSON C. CARKNER, and JAMES L. PIERCE, defendants.

12 STATE OF MISSOURI,
County of St. Louis, ss:

WILLIAM H. SCUDDER, being first duly sworn, says that he is one of the defendants in the above-entitled suit; that all of said defendants are, and for a long time have been, residents of the State of Missouri,

and that neither of said defendants resides, or has ever resided, within the State of Illinois; that on or about the 14th of September, A. D. 1871, a suit was commenced in the circuit court of the United States for the districts of Missouri, by the plaintiff in the above-entitled cause against the defendants in the above-entitled cause; that issues were joined in said cause in the circuit court of the United States for the districts of Missouri, and that said last-mentioned cause is now pending and undetermined in said court.

This affiant further says that, some time previous to the 14th day of February, A. D. 1872, a notice was served upon said defendants, which is as follows, to wit:

"*Notice to take depositions.*

"In the circuit court of the United States for the district of Missouri.

"UNION NATIONAL BANK OF CHICAGO, PLAINTIFF,
"*against*
"CATHERINE AMES AND OTHERS, DEFENDANTS.

"To the above-named defendants:

"You are hereby notified that depositions of witnesses, to be read in evidence in the above-entitled cause on the part of the plaintiff, will be taken at the office of Fuller & Smith, in the city of
13 Chicago, Illinois, (rooms 24 & 25, Central Union Block, cor. Market & Madison streets,) in the county of Cook, and State of Illinois, on the fourteenth day of February, A. D. 1872, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place, and between the same hours, till completed.

(Signed) "LUBKE & PLAYER,
"*Att'ys for Pl'ff.*

"Service of the above notice is hereby acknowledged, and issue of dedimus and all exceptions as to time waived. 187 .

"FULLER & SMITH,
"24 & 25 *Central Union Block.*"

And this affiant further says that he received no notice of the names of the witnesses to be examined, or of the interrogatories to be propounded to the witnesses; that the character of the plaintiff's claim, and the circumstances connected therewith, were such that this affiant could not foresee what witnesses might be produced, or what course of examination might be pursued by the plaintiff's attorneys, and could not properly instruct an attorney as to the cross-examination of the witnesses that might be produced without being present at such examination; and this affiant believed it necessary for him to be personally present at the examination of any witnesses whose depositions might be taken on the part of said plaintiff in said cause, in order to secure a proper cross-examination of such witnesses, and in order that justice might be done in the controversy between said parties.

And this affiant further says that he left St. Louis, Missouri, where he resides, and came to Chicago, in the State of Illinois, for the express and sole purpose of attending the taking of depositions under said notice

hereinbefore referred to, in order that such depositions might be properly taken, and the witnesses produced properly cross-examined; that soon after arriving in Chicago, and on the 14th day of February, A. D. 1872, the time mentioned in said notice, he attended at the office of Messrs. Fuller & Smith, and the taking of depositions in said cause, pursuant to said notice, was commenced; that at the commencement of the taking of said depositions, this affiant was requested by Mr. Smith, one of the attorneys of said plaintiff, to give the full names of the defendants in said cause, and that he thereupon gave and stated the full names of said defendants; that afterwards, and on the same day, and at said office of Fuller & Smith, the attorneys of said plaintiff, and while the deposition of a witness was being taken in said cause, and while this affiant was present and attending to the taking of said deposition, an officer entered said office. This affiant was pointed out
15 to said officer by one of the attorneys of said plaintiff, and the writ issued in the above-entitled cause was then and there served upon this affiant by said officer, and that no other service of said writ has been made upon this affiant.

And this affiant further says that he is informed and believes that the depositions of any witnesses might have been taken in Chicago in said cause pending in said circuit court of the United States for the district of Missouri, upon a commission issued upon interrogatories filed or de bene esse without any notice to the said defendants, and that he believes that said notice which was given to said defendants was served upon said defendants with a view to entice this affiant, or some one of said defendants, within the jurisdiction of this court and to obtain service upon such defendant.

And this affiant further says that said defendants compose the firm of Henry Ames & Co., and while insisting that the said plaintiff has no valid claim whatever against said defendants, or any of them, this defendant says that said firm of Henry Ames & Co. have had no transactions or business with said plaintiff or any other person or persons, out of which the said plaintiff has acquired or obtained any claim against said defendants other than that for which said suit now pending in the circuit court of the United States for the district of Missouri
16 was brought, and that the subject-matter of said last-mentioned suit is the same, to the best of his information and belief, as that of the above entitled suit.

And this affiant further says that he was induced to come within the jurisdiction of this court by the service of said notice upon him; that he came within said jurisdiction for the sole purpose of attending the examination of witnesses whose depositions were to be taken pursuant to said notice. That his personal presence was necessary at the taking of said depositions to secure a proper administration of justice and to protect the rights of said defendants; that he believes that he has been brought within the jurisdiction of this court, and served with process in the above-entitled suit in an improper manner, and that he believes that said notice was given and said depositions taken for the improper purpose of enticing this affiant within the jurisdiction of this court, and obtaining the service of said writ upon him.

W'M. H. SCUDDER.

Sworn to before me this 27th day of February, A. D. 1872.
[NOTARIAL SEAL.] E. P. McCARTY,
Notary Public, St Louis County, Missouri.

(Endorsed:) Filed March 4, 1872. W'm H. Bradley, cl'k.

17 *Transcript from Missouri district.*

UNITED STATES OF AMERICA,
Districts of Missouri, ss:

Declaration.

In the circuit court of the United States for the districts of Missouri.
October term, 1871.

UNION NATIONAL BANK OF CHICAGO, plaintiff,
vs.
CATHERINE AMES, WILLIAM H. SCUDDER, JAMES L. PEARCE, and HUDSON C. CARKENER, defendants.

The Union National Bank of Chicago, a corporation organized by the name aforesaid, under and by virtue of the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3d, 1864, and located and doing business in the city of Chicago, State of Illinois, plaintiff complains of Catherine Ames, William H. Scudder, James L. Pearce, and Hudson C. Carkener, who are all citizens of the State of Missouri, and copartners trading under the name, style, and firm of Henry Ames & Co., defendants, of a plea of trespass on the case on promises. For that whereas certain persons under the name, style, and firm of Leland & Harbach, heretofore, to wit, on the seventh day of July, A. D. 1871, at Chicago, in the State of Illinois, that is to say, at the district aforesaid, made their certain bill of exchange in writing bearing date the day and year aforesaid,
18 and then and there directed the said bill of exchange to the said defendants, copartners as aforesaid by the name, style, and addition of Messrs. Henry Ames & Co., St. Louis, Mo., and thereby then and there requested the said defendants by their name, firm, and addition aforesaid to pay to the order of the said plaintiff, on demand, the sum of eight thousand one hundred and twenty-five dollars, value received, which said bill of exchange the said defendants, copartners as aforesaid, afterwards, to wit, on the day and year aforesaid, at the districts aforesaid, upon sight thereof accepted, whereby the said defendants then and there became liable to pay to the said plaintiff the sum of money in said bill of exchange specified according to the tenor and effect thereof; and the said plaintiff avers that afterwards, to wit, on the eighth day of July, A. D. 1871, at St. Louis, that is to say, at the districts aforesaid, payment of the said sum of money in the said bill of exchange specified was duly demanded by the said plaintiff of the said defendants according to the tenor and effect of said bill of exchange, which was refused, and thereupon said bill of exchange was duly protested for non-payment, by means whereof and by force in the statute in such case made and provided, the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, with damages thereon at the rate of ten per centum, when they, the said defendants, should be thereunto afterwards requested; and being so liable, they, the said defendants, in consideration thereafterwards, to wit, on the day and year last
19 aforesaid, at the districts aforesaid, undertook, and then and

there faithfully promised the said plaintiff to pay it, the said sum of money in the said bill of exchange specified, with damages thereon, at the rate of ten per centum, when they, the said defendants, should be thereunto afterwards requested.

And whereas also, hereafter, to wit, on the said seventh day of July, A. D. 1871, in consideration that the said plaintiff, at the request of the said defendants, copartners under the firm-name and style of Henry Ames & Co. as aforesaid, would discount a certain other bill of exchange before then drawn by certain persons under the firm-name and style of Leland and Harbach, by their said firm-name and style whereby the said Leland & Harbach requested the said defendants by their said name, style, and addition of Messrs. Henry Ames & Co., St. Louis, Mo., to pay to the order of plaintiff, on demand, the sum of eight thousand one hundred and twenty-five dollars, value received, and would pay to the said Leland & Harbach the amount of the said last-mentioned bill of exchange, deducting certain reasonable discount in that behalf, they, the said defendants, by their name, style, and firm aforesaid, promised the plaintiff that they would accept the said bill of exchange in this count first mentioned, upon the same being presented to them for their acceptance thereof; that the said plaintiff afterwards, to wit, on the day last named, confiding in the said promise of the said defendants, discounted the said bill of exchange in this count first mentioned, at
20 said city of Chicago, to wit, at the district aforesaid, and then and there paid to said Leland & Harbach the amount of said bill of exchange in this count last mentioned, after deducting such reasonable discount as aforesaid, the amount so paid being a large amount, to wit, the sum of eight thousand one hundred and four dollars and sixty-four cents; and although the said Leland & Harbach then and there delivered the said bill of exchange in this count first mentioned to said plaintiff, and the said plaintiff afterwards, at St. Louis, in the State of Missouri, that is to say, at the districts aforesaid, and within a reasonable time in that behalf, to wit, on the eighth day of July, A. D. 1871, presented the said last-mentioned bill of exchange to the said defendants for their acceptance thereof, and then and there requested the said defendants to accept the same according to their said promise in that behalf; yet the said defendants did not nor would, when the said last-mentioned bill of exchange was presented to them for their acceptance as aforesaid, and when they were so as aforesaid requested to, accept the same, or at any other time accept the said last-mentioned bill of exchange, but then and always thereafter wholly neglected and refused so to do, and thereby the said plaintiff has wholly lost the said sum of money so advanced by it as aforesaid, and the said bill of exchange is wholly unpaid to plaintiff, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum
21 of money in the said bill of exchange specified, when they, the said defendants, should be thereunto afterwards requested, and being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the districts aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay it, the said sum of money in the said bill of exchange specified, when they, the said defendants, should be thereunto afterwards requested.

And whereas also the said defendants, by and under their firm-name and style aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, were indebted to the said plaintiff in the further sum of eight thousand one hundred and twenty-five dollars of like lawful

money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant, at their special instance and request; and also, in the further sum of eight thousand one hundred and twenty-five dollars of like lawful money for other money by the said plaintiff before that time paid, laid out, and expended to and for the use of the said defendants, and at their like special instance and request; and also, in the further sum of eight thousand one hundred and twenty-five dollars of like lawful money for other money by the said defendants before that time had and received, to and for the use of the said plaintiff; and also, in the further sum of eight
22 thousand one hundred and twenty-five dollars of like lawful money for so much money before that time and then due and payable from the said defendants to the said plaintiff, for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendants to the said plaintiff, and by the said plaintiff forborne to the said defendants for divers long spaces of time before then elapsed at the like special instance and request of the said defendant. And being so indebted they, said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the districts aforesaid, undertook, and then and there faithfully promised the said plaintiff, to pay it, the said several sums of money in this count mentioned, when they, the said defendants, should be thereunto afterwards requested. Nevertheless, the said defendants, not regarding their said several promises and undertakings, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet paid the said several sums of money in the several counts above mentioned, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do; but the said defendants, to pay the same, have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore it brings its suit, &c.

LUBKE & PLAYER.
23 *Att'ys for Plaintiff.*

Def'ts' plea of non-assumpsit.

United States circuit court. Oct. term, 1871.

UNION NATIONAL BANK OF CHICAGO, PL'FF,
vs.
CATHERINE AMES, W'M H. SCUDDER, & JA'S L. Pearce, & H. C. Clarkener, def'ts.

And the said defendants come & defend the wrong & injury when, &c., and say that they did not undertake & promise, in manner & form as the said pl'ff hath thereof complained against them, and of this they put themselves upon the country.

SHARP & BROADHEAD, *Att'ys.*

Similiter.

In the circuit court of the United States for the districts of Missouri.
October term, 1871.

UNION NATIONAL BANK OF CHICAGO, PLAINTIFF,
v.
CATHERINE AMES, WILLIAM H. SCUDDER, JAMES L. Pearce and Hudson C. C'arkener, defendants.

And the said plaintiff, as to the plea of the said defendants above

pleaded, and whereof they have put themselves upon the country, doth the like.

By LUBKE & PLAYER, *its Att'ys.*

24 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writings hereto annexed to be copies of the declaration filed 14th day of September, 1871, the plea and similiter filed October 9, 1871, being all the pleadings on file in case of the Union National Bank of Chicago, plaintiff, against Catherine Ames et al., defendants. And I do further certify that said case is now pending in said court, and remains undetermined.

In witness whereof I hereunto subscribe my name and affix the seal of the said court, at office, in the city of St. Louis, in said districts, this twenty-eighth day of February, in the year of our Lord eighteen hundred and seventy-two.

[SEAL OF COURT.] AUSTIN DRAKE,
Clerk of said Court.

(Endorsed:) Filed March 4, 1872. W'm H. Bradley, cl'k.

And afterwards, on the 7th day of March, A. D. 1872, said motion coming on to be heard, the said plaintiff filed, in opposition to said motion, the following affidavits:

25 *Affidavit of Coolbaugh.*

In circuit court of the United States, northern district of Illinois.

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

WILLIAM F. COOLBAUGH, of lawful age, being first duly sworn, on oath deposes and says that he is president of the Union National Bank of Chicago, which bank is plaintiff in a certain action wherein W'm H. Scudder et als. are defendants, now pending in the circuit court of the United States in and for the northern district of Illinois:

Affiant further says that the said defendants in said suit reside in the city of Saint Louis, in the districts of Missouri; that the cause of action in said suit arose in the city of Chicago, in said northern district of Illinois, on the 7th day of July, A. D. 1871; that being unable to obtain service on said defendants, or either of them, prior to the 14th day of September last past within the jurisdiction of this honorable court, said bank commenced a suit in the circuit court of the United States for the districts of Missouri, on or about the 14th day of September, A. D. 1871; that Messrs. Lubke & Player, of S't Louis, in said district, were the attorneys of said bank, and commenced said suit; that Messrs. Fuller & Smith are the Chicago attorneys of the Union National Bank, and that all correspondence relating to the progress of said cause in
26 the circuit court of the United States for said districts of Missouri, and all consultations with said Lubke and Player, was carried on and had by and between the said attorneys, and this affiant had no knowledge whatever of the taking of depositions, or that the same were proposed to be taken in said case, until the morning of the day that they were in fact taken at the office of the said attorneys, Fuller & Smith.

Affiant further says that he never in any way advised, suggested, or thought of procuring said depositions to be taken, or of notifying said defendants or their attorneys of the taking thereof for the purpose of enticing said defendants, or either of them, within the jurisdiction of said circuit court for said northern district of Illinois; nor did any conversation or correspondence ever take place between him and said attorneys, or either of them, in relation thereto; that he believes, and on his belief states the fact to be, that the said depositions are taken in good faith and in the usual and ordinary way, according to the rules and practice of said circuit court for the districts of Missouri, and without collusion, or any the slightest intent or desire to obtain any undue advantage over the said defendants, or either of them.

Affiant says further that upon being informed that W'm H. Scudder, one of said defendants, was in the city on said 14th day of Feb-
27 ruary, he did, as president of said plaintiff bank, telegraph in the forenoon of said day to Messrs. Lubke & Player, attorneys of said bank, at S't Louis, as aforesaid, for the full names of said defendant's firm, for the purpose of instituting a suit against said firm in this honorable court; that he has always believed, and now does believe, that the ends of justice will be better subserved by having said suit determined in this district, where all the witnesses, with the exception of the said defendant, Scudder, reside, and where the benefit of their oral testimony can be had; and that the said suit was directed to be brought by him on said 14th day of February, A. D. 1872, with that view, and no other; and he distinctly denies any and all collusion or improper conduct in this regard on his own part or on that of any officer or officers of said bank, or the attorneys thereof, or either of them, so far as he any knowledge, information, or belief.

Said affiant further says that he believes, and is so advised by his attorneys, that the claim of said bank against said defendants is a just and valid claim, and that the bank is entitled to and can recover the amount thereof from the said defendants; that prior to the bringing of said suit in said circuit court for the districts of Missouri the affidavits of each and every the witnesses that were called and ex-
28 amined in behalf of the plaintiff therein on said 14th & 15th days of February as to the facts within their knowledge relating thereto were taken, and that he is informed and believes that the same, and each of the same, were read to Hudson C. C'arkner, one of the defendants, prior to the bringing of said suit in said circuit court of Missouri, and that the defendants knew the contents thereof.

W. F. COOLBAUGH.

Subscribed and sworn to before me this 6th day of March, A. D. 1872.

[NOTARIAL SEAL.] JOSEPH E. SMITH,
Notary Public.

Affidavit of C. T. Wheeler.

In circuit court of the United States, northern district of Illinois.

STATE OF ILLINOIS,
County of Cook, city of Chicago, ss:

CALVIN T. WHEELER, of lawful age, being first duly sworn, on oath deposes and says that he is the vice-president of the Union National Bank of Chicago, which bank is plaintiff in a certain action wherein

William H. Scudder & als. are defendants, now pending in the circuit court of the United States in and for the northern district of Illinois.

Affiant further says that the said defendants reside in the city of St. Louis, in the districts of Missouri; that the cause of action in said
29 suit arose in the city of Chicago, in said northern district of Illinois, on the 7th day of July, A. D. 1871; that being unable to obtain personal service on said defendants, or either of them, prior to the 14th day of September last past, within the jurisdiction of this honorable court, said bank commenced a suit in the circuit court of the United States for the districts of Missouri, on or about the 14th day of September, A. D. 1871; that Messrs. Lubke & Player, of St. Louis, in said district, were, and are, the attorneys of said bank, and commenced said suit; that Messrs. Fuller & Smith are the Chicago attorneys of the Union National Bank, and that all correspondence relating to the progress of said cause in the circuit court of the United States for said district of Missouri, and all consultation with said Lubke & Player, was carried on and had by and between the said attorneys, and that this affiant had no knowledge whatever of the taking of said depositions, or that the same were proposed to be taken, until he was notified by one of the said Chicago attorneys of said bank to be present for the purpose of giving his testimony in said cause at their office on the 14th day of February, A. D. 1872.

Affiant further says that he never in any way advised, suggested, or thought of procuring said depositions to be taken, or of noti-
30 fying said defendants, or their attorneys, of the taking thereof, for the purpose of enticing said defendants, or either of them, within the jurisdiction of said circuit court for said northern district of Illinois, nor did any conversation or correspondence ever take place between him and said attorneys, or either of them, relative thereto; that he believes, and on his belief states the fact to be, that the said depositions were taken in good faith and in the usual and ordinary way, according to the rules and practice of said court for the districts of Missouri, and without collusion or any the slightest intent or desire to obtain any undue advantage over the said defendants, or either of them; that he has always believed and now does believe that the ends of justice will be better subserved by having said suit tried and determined in this district were all the witnesses, with the exception of the defendant Scudder, reside, and where the benefit of their oral testimony can be had.

And that said suit was brought on said 14th day of February, A. D. 1872, with that view and no other, and he distinctly denies any and all collusion or improper conduct in this regard on his own part, or on that of any other officer of said bank, or the attorneys thereof, or either of them, so far as he has any knowledge, information, or belief.

31 Affiant further says that said suit is based on a certain draft, all the transactions in relation to the negotiation of which were made with this affiant as vice-president of said bank; that before said suit was instituted in said circuit court of Missouri, the affidavit of this affiant was taken, and also the affidavits of John L. Hancock, Leland and Harbach, and George A. Harbach, which said affidavits were, as this affiant is informed, read to one of the defendants herein before the institution of said suit; and that said affiants were the only witnesses examined on said 14th day of February, 1872.

CALVIN T. WHEELER,
Vice Pres't Union Nat. Bank.

Subscribed & sworn to before me this sixth day of March, 1872.
[NOTARIAL SEAL.] H. A. OSBORN,
Notary Public.

Affidavit of G. A. Ives.

In circuit court of the United States, northern district of Illinois.

STATE OF ILLINOIS,
County of Cook, city of Chicago, ss:

George A. Ives, of lawful age, being first duly sworn, on oath deposes and says that he is the cashier of the Union National Bank of Chicago, which bank is plaintiff in a certain suit wherein William H.
32 Scudder & als. are defendants, now pending in the circuit court of the United States for the northern district of Illinois.

Affiant further says that he never in any way advised, suggested, or thought of procuring any depositions to be taken in any suit pending between said Union National Bank and said defendants, Scudder & als., whether in Illinois, Missouri, or elsewhere, for the purpose of enticing the said defendants, or either of them, within the jurisdiction of the said circuit court of the United States for said northern district of Illinois, nor did any conversation or correspondence ever take place between him and the attorneys of said bank, or either of them, in relation thereto. That he believes, and on his belief states the fact to be, that the depositions referred to in the affidavit of W'm H. Scudder, filed herein, were taken in good faith and in the usual and ordinary way, according to the rules and practice of the circuit court for the districts of Missouri, and without collusion, or any the slightest intent or desire to obtain any undue advantage over the said defendants, or either of them; and he distinctly denies any and all collusion or improper conduct in this regard, on his own part, or on that of any other officer of said bank, or the attorneys thereof, or either of them, so far as he has any knowledge, information, or belief.

G. A. IVES,
Cashier Union National B'k.

33 Subscribed and sworn to before me this sixth day of March, 1872.

H. A. OSBORNE,
Notary Public.

[NOTARIAL SEAL.]

(Endorsed:) Filed March 7, 1872. W'm H. Bradley, cl'k.

Affidavit of P. Player.

STATE OF MISSOURI,
City & County of St. Louis, ss:

PRESTON PLAYER, of lawful age, being duly sworn, on his oath says that he is a member of the firm of Lubke & Player, attorneys at law, and doing business in the city & county of St. Louis, and State of Missouri, and that he was a member of said firm, and as such practicing his profession at the place above named during the whole of the year eighteen hundred and seventy-one; that his firm, as attorn*ies* for the Union National Bank of Chicago, brought suit in the United States

circuit court for the districts of Missouri against Catherine Ames, William H. Scudder, James L. Pearce, & Hudson C. Carkener, composing the firm of Henry Ames & Co., and that said suit was brought in September, 1871, and was returnable to the October term of said court; that said suit was an action of assumpsit, upon a certain bill of exchange drawn by the firm of Leland & Harbach, of Chicago, Illinois, upon said Henry Ames & Co., of St. Louis, and claimed to have
34 been discounted by said bank, said bill being for the amount of $8,125.00 *dollars*, and dated July 7th, A. D. 1871, and that the declaration in said cause contained a count upon said bill as accepted, and one upon a promise to accept said bill; that said cause was brought to issue at said October term, 1871, of said court, a plea of the general issue having been filed therein by Messrs. Sharp & Broadhead, attorn*ies* for defendants; that the witnesses by whom plaintiff expected to prove *its* case, being residents of the city of Chicago, Illinois, affiant's said firm, with a view to preparing said cause for trial, did, under the practice of said court and through George W. Lubke, affiant's partner in his said firm, give notice in writing to the defendants' said attorn*ies*, as he is informed and believes, that depositions of witnesses on behalf of the plaintiff in said cause would be taken in the said city of Chicago, on the fifteenth day of February, A. D. 1872; that said notice was given by affiant's said firm, of their own motion, for the purpose of preparing said case for trial, and not at the suggestion of the said Union National Bank of Chicago, or its officers or agents, or at the suggestion of Messrs. Fuller & Smith, its att'ys in Chicago, and that it was not given for the purpose of procuring or inducing the said defendants in said suit, or either or any of them, to leave the State of Missouri with a view to being present at the taking of the depositions under said notice,
35 nor with the throught or expectation on the part of this affiant, that either, or any, of said defendants would be present at the taking of said depositions, or would leave the State of Missouri and go into the State of Illinois for the purpose of being so present; that no person or persons whatsoever intimated or suggested to this affiant that said defendants, or either of them, would leave the State of Missouri on account of the giving of said notice, or would be present at the taking of said depositions, and that there was no understanding on the part of this affiant with any one that said notice should be given with a view to getting the defendants, or either of them, to come within the jurisdiction of any court or courts in the State of Illinois, or with a view to getting service upon them, or either of them, of a writ issued out of said court or courts; and that said notice was not given with the purpose or intent of bringing said defendants, or either of them, within the jurisdiction of any court in said State of Illinois, or in order to obtain upon them, or any of them, service of any writ issued, or to be issued, out of any such court. And affiant further says that, to the best of his knowledge, information, and belief, the notice to take depositions, hereinbefore mentioned, was the only notice in said suit ever given or caused to be given by his said firm, or either of them, to said defendants in said suit or their attorn*ies*.

Affiant further says that, on the fourteenth day of February,
36 1872, his said firm received a telegram from W. T. Coolbaugh, president of said bank, asking for the names of the defendants, Ames & Co., in full; that he, said affiant, on said day last named, telegraphed an answer to said Coolbaugh giving him the names of said defendants, as desired.

That affiant did not himself serve said notice to take depositions, and

never served any notice in said suit on defendants, or their attorneys.

That affiant first learned that William H. Scudder, one of said defendants, went to Chicago to attend the taking of said depositions on this fifth day of March, 1872.

And further affiant saith not.

PRESTON PLAYER.

Sworn to and subscribed before me this fifth day of March, A. D. 1872.

[NOTARIAL SEAL.] J. F. CONROY,
Notary Public, St. Louis Co., Mo.

(Endorsed:) Filed March 7, 1872. W'm H. Bradley, cl'k.

Affidavit of G. W. Lubke.

STATE OF MISSOURI,
County & City of St. Louis, ss:

GEORGE W. LUBKE, of lawful age, being duly sworn, on oath states as follows:

That he is an attorney and counsellor at law, residing at and practicing in the said city of St. Louis, and that he is one of the members of the law-firm of Lubke & Player, composed of affiant and Preston
37 Player.

That said firm were practicing law in said city of St. Louis in the year 1871, and are still doing so; that said firm of "Lubke & Player," on the fourteenth day of September, A. D. 1871, as counsel for the Union National Bank of Chicago, Illinois, instituted a suit for said bank against Catharine Ames, William H. Scudder, James L. Pearce, and Hudson C. Carkener, as co-partners under the firm-name of "Henry Ames & Co," in the United States circuit court for the districts of Missouri, in assumpsit, for the sum of 8,125 dollars, being the amount of money claimed to have been paid by said bank in discounting a bill of exchange, drawn by Leland & Harbach, of Chicago, upon said "Henry Ames & Co.;" that said action was brought to issue by a plea of the general issue by all the defendants at the October term, 1871, of said court, and was then continued to the next term, which will be in April, 1872, and that said cause will be triable at said April term, 1872, of said court; that it was necessary in said cause to take the testimony of witnesses in behalf of said plaintiff, the said bank, at the city of Chicago; that Messrs. Sharp & Broadhead, of the city of St. Louis, are the counsel of record in said suit for said Henry Ames & Co.; that affiant, on the ninth day of January, 1872, or perhaps a day or two previous to said date, served upon James O. Broadhead, esquire, one of said firm
38 of Sharp & Broadhead, a written notice that depositions in behalf of said bank would be taken in said cause on the fifteenth day of February, A. D. 1872, at the office of Messrs. Fuller & Smith, in said city of Chicago; that said notice was accepted by said Broadhead in writing for said Henry Ames & Co., and in the firm-name of Sharp & Broadhead as their attorneys in said cause; that affiant did not serve said notice upon or see any of the defendants in said suit in person; that said notice was given in conformity to the rules of practice of said court concerning the taking of depositions; that affiant on said ninth day of January, 1872, in said firm-name of "Lubke & Player," wrote a letter of instructions for the taking of depositions in accordance with said notice, and enclosed the same and said acceptance of said notice to

Messrs. Fuller & Smith, of Chicago, by mail; that said notice was given solely for the purpose of making valid the taking of depositions to be used in said suit; that there has been no understanding of any kind between affiant and partner and said Fuller & Smith, or between affiant & partner and said bank, either directly or indirectly, that said notice should be given for any purpose other than for the purpose above stated, and certainly not for the purpose of inducing any of the said
39 firm of Henry Ames & Co. to go to said city of Chicago; that affiant's firm, on the fourteenth day of February, A. D. 1872, received at said city of St. Louis a telegram, which is hereto attached, and marked Exhibit A. That affiant's partner answered the same to the best of affiant's knowledge and belief, and that affiant, on the fifth day of March, 1872, first learned that William H. Scudder had gone to Chicago in person, and attended upon the taking of said depositions in behalf of said Henry Ames & Co.

Further affiant saith not.

GEO. W. LUBKE.

Subscribed and sworn to before me this fifth day of March, 1872.
[NOTORIAL SEAL.] J. F. CONROY,
Notary Public, St. Louis Co., Mo.

EXHIBIT A.

[Pacific & Atlantic Telegraph Company of the United States. St. Louis offices. No. 307 North Third st., Laclede Hotel, Merchants' Exchange.]
Dated W. Chicago, Feb. 14, 1872.
Received at 307 N. 3d st., Feb'y 14, 1872—11.15 a. m.
To LUBKE & PLAYER,
Attorneys, 203 3d st. :

Telegraph names of defendants Ames & Co. in full.
W. T. COOLBAUGH, *Pres't.*

(Endorsed:) Filed March 7, 1872. Wm. H. Bradley, cl'k.

40 And at the same time Messrs Fuller & Smith stated upon their professional honor that they had not enticed or caused to be enticed the said Scudder within the jurisdiction of this court for the purpose of obtaining service upon him in the above-entitled cause. That they were not aware, & I had no expectation that said Scudder would be in Chicago at the time, & that they were causing the depositions to be taken in good faith, to be used at St. Louis, & had no idea of serving said Scudder with procéss until after he presented himself in this jurisdiction, which statement it was agreed should be taken in lieu of an affidavit.

And afterwards, and on the 3d day of April, A. D. 1872, the said motion having been heard, and taken under advisement by the court, was denied by the court, and the said defendant, Scudder, then and there excepted to the ruling of the court in denying said motion And inasmuch as said matters, or some of them, do not appear of record in said cause, the said defendant prays this his bill of exceptions may be signed, sealed, and made part of the record of said cause, which is done.

H. W. BLODGETT, [SEAL.]
Dist. Judge.

(Endorsed:) Filed April 3d, 1872, W'm H. Bradley, cl'k.

41 On this day, to wit, the fifth day of April, A. D. 1872, said plaintiff, by its attorneys, filed in said clerk's office its declaration in said entitled cause. Which said declaration is in words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

In the circuit court of the United States for said northern district of Illinois.

UNION NATIONAL BANK OF CHICAGO in said district, plaintiff,
vs.
CATHERINE AMES, WILLIAM H. Scudder, Hudson C. Carkner, & James L. Pierce, defendants.

The Union National Bank of Chicago, a corporation existing by virtue of the laws of the United States, and doing business at Chicago, in said northern district of Illinois, plaintiff in this action, by Fuller & Smith, its attorneys, complains of Catherine Ames, William H. Scudder, Hudson C. Carkner, & James L. Pierce, defendants, co-partners under the firm-name and style of Henry Ames & Co., of a plea of trespass on the case on promises:

For that whereas on the 7th day of July, A. D. 1871, at Chicago
42 aforesaid, in the district aforesaid, certain persons under the firm-name and style of Leland & Harbach, made their certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to the said defendants, co-partners as aforesaid, by the name and style of Messrs. Henry Ames & Co., St. Louis, Mo., and thereby then and there requested the said defendants, by their name and style aforesaid, to pay to the order of the said plaintiff on demand the sum of eight thousand one hundred and twenty-five dollars value received; which said bill of exchange the said defendants, co-partners as aforesaid, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, upon sight thereof accepted, whereby the said defendants then and there became liable to pay to the said plaintiff the said sum of money in said bill of exchange specified, according to the tenor and effect thereof; and the said plaintiff avers that afterwards, to wit, on the eighth day of July, A. D. 1871, at St. Louis, that is to say, at Chicago, in the district aforesaid, payment of the said sum of money in the said bill of exchange specified, was duly demanded by the said plaintiff, of the said defendants, according to the tenor and effect of said bill of exchange, which was then & there refused; and thereupon said bill of exchange was duly protested for non-
43 payment. By means whereof and by force of the statute in such case made and provided, the said defendants then & there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified, with damages thereon at the rate of ten per centum, when the said defendants should be afterwards thereunto requested, and being so liable they, the said defendants, in consideration thereof afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and then & there promised the said

plaintiff to pay it, the said sum of money in the said bill of exchange specified, with damages thereon at the rate of ten per centum, when they, the said defendants, should be thereunto afterwards requested.

And whereas, also, heretofore, to wit, on the said 7th day of July, A. D. 1871, in consideration that the said plaintiff at the request of the said defendants, co-partners under the firm-name and style of Henry Ames & Co. as aforesaid, would discount a certain bill of exchange before then drawn by certain persons under the firm-name and style of Leland & Harbach, by their said firm-name & style, whereby the said Leland & Harbach requested the said defendants, by the said name and style, and addition of Messrs. Henry Ames & Co., St. Louis, Mo.,
44 to pay to the order of said plaintiff on demand the sum of $8,125.00, value received, and would pay to the said Leland & Harbach the amount of the said last mentioned bill of exchange, deducting certain reasonable discount in that behalf, they the said defendants, by their name and style & firm aforesaid, promised the plaintiff that they would accept the said bill of exchange in this count first mentioned upon the same being presented to them for their acceptance thereof; that the said plaintiff afterwards, to wit, on the day last named, confiding in the said promise of the said defendants, discounted the said bill of exchange in this count first-mentioned, at said city of Chicago, in the district aforesaid, and then & there paid to said Leland & Harbach the amount of said bill of exchange in this count last mentioned, after deducting such reasonable discount as aforesaid, the amount so paid being a large amount, to wit, the sum of $8,104.64; and although the said Leland & Harbach then & there delivered the said bill of exchange in this count first mentioned to said plaintiff, and the said plaintiff afterwards, at St. Louis, that is to say at Chicago, in the district aforesaid, and within a reasonable time in that behalf, to wit, on the 8th day of July, A. D. 1871, presented the last mentioned bill of exchange to the said defendants for their acceptance, and then & there requested the
45 defendants to accept the same according to the said promise in that behalf. Yet the said defendants did not nor would when the said last-mentioned bill of exchange was presented to them for their acceptance as aforesaid, and when they were as aforesaid requested to accept the same, or at any other time accept the said last mentioned bill of exchange, but then, and always thereafter, wholly neglected and refused so to do, and thereby the said plaintiff has wholly lost the said sum of money so advanced by it as aforesaid, and the said bill of exchange is wholly unpaid to plaintiff. By means whereof the said defendants then & there became liable to pay to the said plaintiff the said sum of money in said bill of exchange specified when the said defendants should be thereto afterwards requested; and being so liable they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook, and then & there faithfully promised the said plaintiff to pay it the said sum of money in said bill of exchange specified, when they the said defendants should be thereunto afterwards requested.

Also, for that whereas the said defendants, on the 7th day of July, A. D. 1871, at Chicago aforesaid, in the northern district of Illinois aforesaid, by and through their agents at the place aforesaid, to wit,
46 the firm of Leland & Harbach, made and drew their said defendants certain bill of exchange in writing, bearing date day and year last aforesaid, upon themselves, the said defendant firm of Henry Ames & Company, by the name and description of Henry Ames & Co., and thereby required the said firm of Ames & Co. to pay to the said

plaintiff, by the name of Union National Bank, or its order on demand, to wit, at sight of said bill of exchange, eight thousand one hundred and twenty-five dollars ($8,125) for value received, and then and there delivered the said bill of exchange to the said plaintiff, and the said plaintiff avers that the said plaintiff afterward, to wit, on the same day at St. Louis, to wit, at Chicago, in said northern district of Illinois, according to the custom of merchants, showed and presented, and caused to be shown and presented, the said bill to the said defendants, Henry Ames & Co., for their acceptance thereof, and then and there required them the said defendants to accept the same, but the said defendants did not nor would then and there accept the said bill, but then and there wholly and absolutely refused so to do, whereof the said defendants then & there on the same day had notice at St. Louis, to wit, at Chicago aforesaid, in the district aforesaid. By reason of which several premises, and by force of the custom and law of merchants, they, the said defendants,
47 became liable to pay to the plaintiff the said sum of money in the said bill specified, when they the said defendants should be thereunto requested, and being so liable, then and there, in consideration thereof, promised so to do, to wit, at Chicago, in the northern district aforesaid. Yet though often thereto requested, the said defendants have not paid said sum of money in the said counts, or either of them mentioned, but wholly neglect and refuse to do it.

Also, for that whereas the said defendants, heretofore, to wit, on the fourteenth day of February, in the year of our Lord one thousand eight hundred and seventy-two, at Chicago, in said county, became and was indebted to the said plaintiff in the sum of ten thousand dollars of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the defendants; and to the special instance and request of the said defendants, and being so indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendants should be thereunto afterwards requested.

And whereas, also, the said defendants, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the
48 said plaintiff had, before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiff; the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of sale and delivery thereof were reasonably worth, when the said defendants should be thereunto afterwards requested; and the said plaintiff aver that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof, were reasonably worth the further sum of ten thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, on the same day and year, and at the place aforesaid, had notice; and whereas, also, the said defendants, afterwards, to wit, on the same day and year and at the place aforesaid, were indebted to the said plaintiff in the further sum of ten thousand dollars of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendants, and at the like request of the said defendants; and in the

like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants, and at the request of the said defendants; and in the like sum for other money by the
49 said defendants before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon, and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiff; and in the like sum for the price and value of work then done and material for the same, provided by the plaintiff for the defendants at the like special request of the defendants.

And being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendants should be thereunto afterwards requested. And whereas, also, the said defendants, afterwards, to wit, and the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendants then and there found to be in arrear and indebted to the said plaintiff in the further sum of ten thousand dollars of the like lawful money as aforesaid.
50 And being so found in arrear and indebted to the said plaintiff, and the said defendants, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendants should be thereunto afterwards requested. Nevertheless the said defendants (although often requested, etc.) have not yet paid the several sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiff; but to pay the same or any part thereof, to the said plaintiff the said defendants have hitherto altogether refused, and still do refuse, to the damage of the said plaintiff, ten thousand dollars; and therefore the said plaintiff brings suit, etc.

FULLER & SMITH,
Plaintiff's Attorney.

(Endorsed:) Filed this 5th day of April, 1872. W'm H. Bradley, clerk.

Afterwards, to wit, on the 6th day of May, A. D. 1872, said defendant, Scudder, by his attorneys, filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

51 *Plea.*

In the circuit court of the United States for the northern district of Illinois, of the May term, A. D. 1872.

WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames, James L. Pearce, and Hudson C. Carkener,
ats
UNION NATIONAL BANK OF CHICAGO.

And the said defendant, William H. Scudder, impleaded with Catherine Ames, James L. Pearce, and Hudson C. Carkener, by Thompson

& Bishop, his attorneys, comes and defends the wrong and injury, when, &c., and prays judgment of the said writ, because he says that heretofore and before the sueing out of said writ and the commencement of this suit the said plaintiff, in the circuit court of the United States for the districts of Missouri, impleaded the said defendants, and commenced its certain suit against them in a certain plea of trespass on the case upon promises, and for the not performing of the very same identical alleged promises and undertakings in the said declaration in this present suit mentioned, as by the record and proceedings thereof remaining in the said circuit court of the United States for the districts of
52 Missouri more fully appears.

And the said defendant further saith that the parties in this and the said former suit are the same, and not other or different persons or parties; that the said former suit so brought and prosecuted against the said defendants by the said plaintiff, as aforesaid, was still depending in the said circuit court of the United States for the districts of Missouri at the times of the suing out of the writ in this suit and the service of said writ on this defendant and the filing of the declaration in this suit; that the said circuit court of the United States for the districts of Missouri had before and at the time of the commencement of this suit jurisdiction of said suit pending in said court, and jurisdiction over all the parties to said suit; that each and all of the said defendants at the time of the commencement of this suit resided and still reside within said districts of Missouri; that the property of each and all of said defendants is situated within said districts of Missouri, and was so situated at the time of the commencement of this suit, and that the said property could, at the time of the commencement of this suit, and still can, be reached by process from the said circuit court of the United States for the districts of Missouri; that said defendants had at
53 the time of the commencement of this suit, and still have, within the said districts of Missouri, and liable to execution out of the circuit court of the United States for the districts of Missouri, property both real and personal sufficient to satisfy all claims made by said plantiff against said defendants; that the said defendants did not, nor did either of them, at the time of the commencement of this suit, or at any time since, reside within the State of Illinois; and that this defendant did not at the time of the commencement of this suit, or at any time since, own or possess any property within the State of Illinois subject to execution out of this court.

And this the said defendant is ready to verify. Wherefore he prays judgment of the said writ in this suit, and that the same may be quashed, &c.

THOMPSON & BISHOP,
Att'y for Def't Wm. H. Scudder.

THOMPSON & BISHOP,
Attorneys for Def't Scudder and of counsel.

STATE OF MISSOURI, *County of St. Louis, ss:*

William H. Scudder, being first duly sworn, says that the above plea is true in substance and fact.

W. H. SCUDDER.

Subscribed and sworn to before me this second day of May, A. D. 1872. Witness my hand and notarial seal.

HENRY W. HANCE.
54 [NOTARIAL SEAL.] *Notary Public, St. Louis Co., Mo.*

[Endorsed:] Filed May 6, 1872. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 7th day of November, A. D. 1872, said plaintiff, by its attorneys, filed in said clerk's office its demurrer in said entitled cause, which said demurrer is in words and figures following, to wit:

Demurrer to plea.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In circuit court of the United States for said northern district.

UNION NATIONAL BANK
vs.
CATHERINE T. AMES & ALS.

And the said plaintiff comes and says that for anything by the said defendant above in pleading alleged the said writ of the plaintiffs ought not to be quashed, because they say that the said plea by the said defendant in manner and form aforesaid above pleaded, and the matter therein contained, are not sufficient in law to quash the writ of the plaintiff thereof against said defendant, to which they the plaintiffs have no necessity nor are bound by the law of the land to answer, and this they are ready to verify. Wherefore they, the plaintiffs, for want
55 of a sufficient answer in this behalf, pray judgment that the said writ may be adjudged good, and that the said defendants answer further thereto.

By FULLER & SMITH,
Its Attorneys.

[Endorsed:] Filed Nov. 7, 1872. Wm. H. Bradley, cl'k.

Afterwards, on the 12th day of November, in the October term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Demurrer overruled & leave to reply.

THE UNION NATIONAL BANK OF CHICAGO
v.
CATHERINE AMES ET AL. } Assumpsit.

The court having considered and being now sufficiently advised upon the demurrer of the plaintiff to the plea of abatement of the defendants filed, overrules the same; and thereupon, on motion of the plaintiff, by its attorney, leave is given it to withdraw its said demurrer and to reply to said plea.

Afterwards, to wit, on the 16th day of November, A. D. 1872, said plaintiff, by its attorneys, filed in said clerk's office its replication in said entitled cause, which said replication is in the words and figures following, to wit:

56 *Replication.*

In the circuit court of the United States in the northern district of Illinois, Oct. T. 1872.

UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, IMPLEADED WITH CATHERINE AMES, JAMES L. PEARCE, & HUDSON C. CARKENER.

And the said plaintiff, the Union National Bank of Chicago, by Fuller & Smith, its att'ys, comes & says that, by anything by the said defendant, William H. Scudder, impleaded with Catherine Ames, James L. Pearce, and Hudson C. Carkener, above in pleading alleged, the writ herein ought not to be quashed, because it says that on Tuesday, the 9th day of April, A. D. 1872, the same being one of the days of the April term, A. D. 1872, of the circuit court of the United States for the districts of Missouri, the said suit in the said plea of the said defendant, William H. Scudder, mentioned, wherein it is in said plea above alleged that the said plaintiff herein impleaded the said defendants in a certain plea of trespass on the case upon and for the non-performing of the very same identical alleged promises and undertakings in the said declaration in this present suit mentioned, and which said former suit it is in said
57 plea above alleged was depending in the said circuit court of the United States for the districts of Missouri at the times of suing out of the writ in this suit, and the service of said writ on the defendant, William H. Scudder, and the filing of the declaration in this suit was by the order and judgment of the said the circuit court of the United States for the districts of Missouri, and on the motion of the plaintiff therein, by its attorneys, dismissed out of said courts at the costs of said plaintiff, as by the record thereof in said circuit court of the United States for the districts of Missouri remaining more fully and at large appears. And this the said plaintiff is ready to verify by that record, and prays that the said record may be seen and inspected, &c., and for judgment, &c.

UNION NATIONAL BANK OF CHICAGO,
By FULLER & SMITH, *Its Attorneys.*

FULLER & SMITH,
of Counsel.

(Endorsed:) Filed Nov. 16, 1872. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 24th day of December, A. D. 1872, said defendant Scudder, by his attorneys, filed in said clerk's office his demurrer in said entitled cause, which said demurrer is in words and figures following, to wit:

58 *Demurrer to replication.*

In the circuit court of the United States for the Northern district of Illinois, of the December term, A. D. 1872.

UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, IMPLEADED WITH CATHERINE AMES, JAMES L. PEARCE, & HUDSON C. CARKENER.

And the said William H. Scudder, defendant, impleaded with, &c.,

by Thompson & Bishop, his attorneys, saith that the replication of the said plaintiff to the said plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain its aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same, and this the said defendant is ready to verify; wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain its aforesaid action thereof against him, &c.

THOMPSON & BISHOP,
Att'ys for Def't Scudder.

(Endorsed:) Filed Dec. 24, 1872.. W'm H. Bradley, cl'k.

59 On the same day, to wit, on the 24th day of December, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Demurrer overruled.—Leave to plead.

THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES ET AL.

Now come the parties, by their attorneys, and thereupon the demurrer of the defendant, William H. Scudder, to the replication of the plaintiff to the plea of said defendant is submitted to the court, and the court being now fully advised thereon, overrules said demurrer with leave to the said defendant to answer over in ten days.

On this day, to wit, the 3d day of January, A. D. 1873, said defendant Scudder, by his attorneys, filed in said clerk's office his pleas in said entitled cause, which said pleas are in words and figures following, to wit:

Pleas.

In the circuit court of the United States for the *D*orthern district of Illinois, of the December term, A. D. 1872.

WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames, James L. Pierce & Hudson C. Carkener
ads.
UNION NATIONAL BANK OF CHICAGO.

60 1. And now comes the said defendant, William H. Scudder, impleaded with Catharine Ames and others, by Thompson & Bishop, his attorneys, and defends the wrong and injury, when, &c., and saith that he did not, together with the said Catherine Ames and others, undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this the said defendant, the said William H. Scudder, put himself upon the country, &c.

By THOMPSON & BISHOP,
Att'ys for Def't Scudder.

STATE OF MISSOURI,
County of St. Louis, ss:

William H. Scudder, being first duly sworn, maketh oath and saith that he is defendant in this cause, and that the foregoing plea by him pleaded is true in substance and fact.

W. H. SCUDDER.

Subscribed and sworn to before me this 28th day of December, A. D. 1872.

[NOTARIAL SEAL.] CH'S R. GOODIN,
Notary Public, St. Louis Co.

2. And for a further plea in this behalf as to the first and second counts of said declaration, the said defendant, William H. Scudder, impleaded with, &c., says actio non, &c., because he says that the
61 several supposed promises and undertakings in the said first and second counts respectively mentioned were special promises, and each of them was a special promise for the debt of another person, to wit, the said Leland & Harbach, and that neither the promise on which this action is brought nor any memorandum or note thereof was or is in writing signed by the party to be charged therewith, or by any other person thereunto by such party lawfully authorized in manner and form as required by the statute of the State of Illinois. And this the said defendant, the said William H. Scudder, is ready to verify. Wherefore he prays judgment, &c.

THOMPSON & BISHOP,
Att'ys for Def't Scudder.

3. And for a further plea in this behalf as to the first count of the said plaintiff's declaration, the said defendant Scudder. impleaded with, &c., says actio non, &c., because he says that the said bill of exchange in said first count mentioned was directed to the defendants herein, and was payable at St. Louis, Mo., that is to say, at St. Louis, in the State of Missouri, and that there was no acceptance of the said bill of exchange in writing signed by the said defendants or by their lawful agent, and that by the laws of the State of Missouri no person can be charged as acceptor of a bill of exchange unless his acceptance is in writing, signed by himself or his lawful agent. And this the said defendant, im-
62 pleaded, &c., is ready to verify. Wherefore he prays judgment, &c.

By THOMPSON & BISHOP,
Att'ys for Def't Scudder.

4. And for a further plea in this behalf as to the second count of the said plaintiff's declaration, the said defendant Scudder, impleaded with, &c., says actio non, &c., because he says that the said bill of exchange, in second count mentioned, was drawn upon the said defendants, and was payable at St. Louis, Mo., that is to say, at St. Louis, in the State of Missouri; and that the promise of the said defendants to accept the said bill of exchange in said second count mentioned, if any such promise was made, was not in writing, and shown to the said plaintiff, and that by the laws of the State of Missouri said promise was not binding upon said defendants, and this the said defendant is ready to verify. Wherefore he prays judgment, &c.

THOMPSON & BISHOP,
Att'ys for Def't Scudder.

5. And for a further plea in this behalf as to the first and second counts of the said plaintiff's declaration, the said defendant, William H. Scudder, impleaded with, &c., says actio non, &c., because he says
63 that the said bills of exchange, in said first and second counts mentioned, were and each of them was drawn upon the defendants in this suit at St. Louis, Mo., that is to say, at St. Louis, in the State of Missouri; and that the liability of the said defendants upon said bills of exchange, and each of them, and upon any acceptance or promise to accept said bills of exchange, or either of them, depends upon the laws of the State of Missouri, and that there was no acceptance in writing of the said bills of exchange, or either of them, by the defendants herein signed by them, or by their agent; and the defendant Scudder, impleaded, &c., avers that by the laws of the State of Missouri he is not liable upon said bills of exchange, or either of them, and he pleads and sets up the laws of the State of Missouri as a bar to the said plaintiff's right to recover under the first and second counts of his said declaration. And this he, the said defendant, is ready to verify. Wherefore he prays judgment, &c.

THOMPSON & BISHOP,
Atty's for Def't Scudder.

6. And for a further plea in this behalf as to the first and second counts of said declaration, the said defendant Scudder, impleaded with, &c., says actio non, &c., because he says that the domicil of each and all of the defendants herein was, on the 7th day of July, A. D. 1871,
64 and ever since has been, at St. Louis, in the State of Missouri, and that in the address of the said defendants, in each of said bills of exchange in said first and second counts mentioned, St. Louis, Mo., was mentioned, and that there was no acceptance by said defendants of said bills of exchange, or either of them, in writing signed by said defendants or by their lawful agents; and this defendant avers that by the laws of the State of Missouri this defendant was not and is not liable on the said supposed promises and undertakings in said first and second counts mentioned, and this the said defendant is ready to verify. Wherefore he prays judgment, &c.

THOMPSON & BISHOP,
Att'ys for Def't Scudder.

7. And for a further plea in this behalf as to the first and second counts of said declaration, the said defendant Scudder, impleaded with, &c., says actio non, &c., because he says that the said bills of exchange in said counts mentioned were directed to the said defendants at their place of domicil, St. Louis, in the State of Missouri, and that the liability of said defendants on each of said bills of exchange depends upon the laws of said State of Missouri, and that there was no acceptance in writing of said bills, or either of them, by said defendants, signed
65 by them or by any lawful agent of theirs; and this defendant avers that by the laws of the said State of Missouri he cannot be charged as acceptor of said bills of exchange, or of either of them, and this he is ready to verify. Wherefore he prays judgment, &c.

THOMPSON & BISHOP,
Att'ys for Def't Scudder.

(Endorsed:) Filed Jan'y 3d, 1873. W'm H. Bradley, cl'k.

On this day, to wit, the 16th day of January, A. D. 1873, said plaintiff, by its attorneys, filed in said clerk's office its demurrer to said pleas

in said entitled cause; which said demurrer is in words and figures following, to wit:

Demurrer to plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In circuit court of the said State for said northern district.

UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES & ALS.

And the said plaintiff, the Union National Bank of Chicago, as to the said pleas of the said defendant, William H. Scudder, secondly, thirdly, fourthly, fifthly, sixthly, and seventhly, above pleaded,
66 saith that the same, & each of the same, and the matters therein contained, and in each of said pleas respectively contained, in manner & form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude it, the said plaintiff, from having or maintaining its aforesaid action thereof against the said defendant, and that it, the said plaintiff, is not bound by law to answer the same, and this it, the said plaintiff, is ready to verify; wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment, and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

By FULLER & SMITH,
Its Attorneys.

(Endorsed:) Filed Jan'y 16, 1873. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 1st day of February, A. D. 1873, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof, in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Ruling on demurrer.

THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES ET AL. } Assumpsit.

67 Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the plaintiff to the second, third, fourth, fifth, sixth, and seventh special pleas filed herein; and, after hearing the arguments of counsel, the court sustains said demurrer to said second, fourth, fifth, sixth and seventh special pleas, and overrules it as to the said third special plea.

On this day, to wit, the 3d day of February, A. D. 1873, said plaintiff, by its attorneys, filed in said clerk's office its replication to said 3d plea in said entitled cause; which said replication is in words and figures following, to wit:

Replication to 3d plea.

In the circuit court of the United States for the northern district of Illinois.

UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames, James L. Pierce & Hudson C. Carker.

And now comes the said pl'ff, by its att'ys, Fuller & Smith, & as to the plea by the said def't to the said first count of said pl'f's declaration by him thirdly above pleaded, says precludi non, because it says
68 that said bill of exchange in said first count mentioned was drawn by said firm of Leland & Harbach on said defendants, constituting the firm of Henry Ames & Co., as in said first count set forth on the 7th day of July, A. D. 1871, at the city of Chicago, in the State of Illinois, & in the northern district of Illinois, by direction and authority of said def'ts, constituting said firm of Henry Ames & Co., to said Leland & Harbach, given & imparted on said 7th day of July, A. D. 1871, at said Chicago, in said State & northern district of Illinois; and that said def'ts, constituting said firm of Henry Ames & Co., at said Chicago, in said State & district, on said 7th day of July, A. D. 1871, then & there promised to accept said bill of exchange so drawn under their direction & authority as aforesaid; and said pl'f' further avers that, upon the faith & credit that said def'ts, constituting the firm of Henry Ames & Co., had directed & authorized the drawing of said bill of exchange, & promised to accept the same, all of which was communicated to said pl'f' before it discounted said bill of exchange, & in consideration thereof it, said pl'f', on said 7th day of July, A. D. 1871, at Chicago, in the State and northern district of Illinois, discounted said bill of exchange & advanced & paid over to said Leland & Harbach the amount of said bill of exchange, deducting certain reasonable discount in that behalf,
69 at Chicago, in said State & district, on said 7th day of July, A. D. 1871. And said pl'f' further avers that the drawing of said bill of exchange by said Leland & Harbach, the giving & imparting to said Leland & Harbach by said defendants of the direction & authority to draw said bill of exchange, & the promise of said def'ts to accept the same, & the discounting of said bill of exchange upon the faith & credit of the direction, authority, & promise to accept of said def'ts by said pl'fs, all transpired at Chicago, in the State & northern district of Illinois, on the 7th day of July, A. D. 1871, & in view of & with reference to the laws of the State of Illinois, and not those of the State of Missouri, in that behalf. By reason of which said several premises the said pl'f' avers that the said defendants, under the firm name of Henry Ames & Co., became & are liable to said pl'f' as acceptors of the said bill of exchange, and to replace & pay to said pl'f' the amount thereof at Chicago, in the State & district of Illinois aforesaid. And of this said pl'f' puts itself upon the country, &c.

FULLER & SMITH,
Pl'f's Att'ys.

(Endorsed:) Filed Feb'y 3d, 1873. W'm H. Bradley, cl'k.

70 Afterwards, to wit, on the 4th day of February, A. D. 1873,

said defendant, Scudder, by his attorneys, filed in said clerk's office his motion in said entitled cause; which said motion is in words and figures following, to wit:

Motion to strike rep. from files.

In the circuit court of the United States for the northern district of Illinois.

UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames et al.

And now comes the said William H. Scudder, defendant, impleaded with, &c., by his attorneys, and moves that the replication filed by the plaintiff to the third plea of the said defendant Scudder be stricken from the files for the reason that said replication was filed without leave of the court, and after demurrer to plea had been overruled.

By THOMPSON & BISHOP,
Att'ys for Def't Scudder.

(Endorsed:) Filed Feb'y 4, 1873. W'm H. Bradley, cl'k.

On this day, to wit, the 7th day of February, A. D. 1873, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof before the Hon. Henry W. Blodgett, judge, appears the following entry in said entitled cause, to wit:

71 *Motion overruled & leave to reply.*

THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES ET AL.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant to strike the replication of the plaintiff to the third plea of the defendant, William H. Scudder, from the files, and, after hearing the arguments of counsel, the court overrules said motion; and on motion of the said defendant, by his attorney, leave is given him to demur or reply to said replication by Monday morning next.

Afterwards, to wit, on the 10th day of February, A. D. 1873, said defendant Scudder, by his attorneys, filed in said clerk's office his demurrer in said entitled cause; which said demurrer is in words and figures following, to wit:

Dem'r to repl'n to 3d plea.

In the circuit court of the United States for the northern district of Illinois, of the December term, A. D. 1873.

WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames et al.,
ats.
UNION NATIONAL BANK.

And the said William H. Scudder, defendant, imp'eaded with, &c.,

sa'th that the replication of the said plaintiff to the said third plea
72 of this said defendant, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to maintain and support the first count of his said declaration, and that he, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment, &c.

And the said defendant states and shows to the court here the following causes of demurrer in law to the said replication, that is to say:

1. That the said replication improperly concludes to *to* the country.

2. That the said replication is founded upon and contains matter and claim which is a departure from the matter and claim relied upon and contained in the said first count of said declaration, and does not fortify or support the same in this, to wit: That in the said first count of said declaration the plaintiff hath alleged that certain persons, to wit, Leland & Harbach, made their certain bill of exchange in writing, and directed the same to the defendants, and that the defendants afterwards, upon sight thereof, accepted the same, and yet the said plaintiff in the said replication to the plea of this defendant, showing that said bill of exchange in said first count mentioned was directed to the defendants and
73 payable at St. Louis, in the State of Missouri, and that by the laws of the State of Missouri the defendants could not be charged as acceptors of said bill of exchange, hath replied that the said bill of exchange was drawn by the direction and authority of the defendants, and that the defendants promised to accept the said bill of exchange, and that upon the faith and credit that the defendants had directed and authorized the drawing of said bill of exchange, and promised to accept the same, the plaintiff discounted said bill of exchange and advanced and paid over to said Leland & Harbach the amount of said bill of exchange, deducting certain reasonable discount at Chicago, in the State and district of Illinois.

3. That said replication contains matter which is a departure from the matter relied upon in said first count of said declaration, and does not fortify or support the same in this, to wit: That in said first count the plaintiff alleged that the defendants became liable to pay to the plaintiff a certain sum of money in a certain bill of exchange specified, and certain damages by reason of the acceptance by said defendants of said bill of exchange, and yet in its said replication to the plea of this defendant, showing that he could not be charged as acceptor of said bill for the reason that said bill was directed to the defendants and
74 payable at St. Louis, in the State of Missouri, and there was no acceptance in writing of the same as required by the laws of the State of Missouri, the plaintiff hath alleged that the defendants became liable to replace and pay to said plaintiff the amount of said bill of exchange because, at Chicago, in the State of Illinois, the said bill of exchange was drawn by direction and authority of the defendants, and the defendants promised to accept the same, and the plaintiff discounted said bill on the faith and credit that such bill was so drawn, and that defendants had promised to accept the same.

4. For that the said plaintiff hath not, in or by his said replication, taken or tendered any single or material issue out of or upon the said plea of this defendant by him thirdly above pleaded.

5. For that the plaintiff hath, in and by its said replication to the said third plea, attempted to put in issue several distinct, material, and traversable matters, all of which cannot properly be put in issue in and

by such replication; and the said replication is double and argumentative, and no certain or sufficient issue can be taken thereon, and is in other respects insufficient, defective, informal, and uncertain.

THOMPSON & BISHOP,
Att'y for Def't Scudder.

(Endorsed.) Filed Feb'y 10, 1873. Wm. H. Bradley, cl'k.

75 Afterwards, to wit, on the 11th day of February, A. D. 1873, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

Demurrer sustained.

THE UNION NATIONAL BANK OF CHICAGO
vs.
CATHERINE AMES ET AL. } Assumpsit.

Now comes the parties, by their attorneys, and thereupon the demurrer of the defendant, William H. Scudder, to the replication of the plaintiff to the third plea filed herein submitted to the court, and the court, being sufficiently advised therein, sustains said demurer.

On this day, to wit, the 24th day of February, A. D. 1873, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Jury empanneled.

THE UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, IMPLEADED WITH CATHerine Ames, Hudson C. Carkner, and James L. Pierce. } Assumpsit.

76 Now come the parties, by their attorneys, and upon issue joined upon the pleas of the defendant, William H. Scudder, filed herein, thereupon come a jury of good and lawful men, to wit: James Foster, William Van Fleet, Royal F. Wilds, P. Burns, William Kelley, W. H. Woodbury, W. F. Moore, George Downs, H. N. Heald, William Sensor, Eugene Rodgen, and Alexander White, who were all duly elected, tried, and sworn well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 25th day of February, A. D. 1873, in said December term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

THE UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, &C. } Assumpsit.

Now come again the parties, by their attorneys, and now come also

the jury in this behalf empanneled and sworn; and after hearing the concluding evidence, and a part of the arguments of counsel, the
77 hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 26th day of February, A. D. 1873, in said December term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Verdict.

THE UNION NATIONAL BANK OF CHICAGO *vs.* WILLIAM H. SCUDDER, IMPLEADED, &C. } Assumpsit.

Now come again the parties, by their attorneys, and now comes also the jury in this behalf empanneled and sworn; and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess its damage to the sum of five thousand nine hundred and twenty-two dollars and forty-five cents. And thereupon the defendant by his attorney moves the court for a new trial herein.

78 Afterwards, to wit, *the* on the 24th day of March, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Motion overruled & judgment.

THE UNION NATIONAL BANK OF CHICAGO *vs.* WILLIAM H. SCUDDER, IMPLEADED WITH CATHERINE AMES, HUDSON C. CARKNER, AND JAMES L. PIERCE. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant, William H. Scudder, heretofore entered herein for a new trial of this cause; and after hearing the arguments of counsel the court overrules said motion, and thereupon the said defendant, by his attorney, moves the court in arrest of judgment, which is overruled.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the said defendant, William H. Scudder, impleaded as aforesaid, the said sum of five thousand nine hundred and twenty-two dollars and forty-five cents, their damages so as aforesaid assessed, together with its costs in this behalf expended, amounting to the sum of sixty-eight dollars and four cents, and that they have execution therefor.

79 On the hearing of said cause, the following exceptions were taken, which were allowed by the court and made of record, and are in the words and figures following, to wit:

Now come again the parties, by their attorneys, and now come also

Exceptions on hearing of cause.

In the circuit court of the United States for the northern district of Illinois.

UNION NATIONAL BANK OF CHICAGO
vs.
WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames, Henry C. Carkener, and James L. Pearce. } Bill of exceptions.

Be it remembered that, on the trial of this cause, the plaintiff gave in evidence these facts:

That, for over a year prior to the 7th day of July, 1871, the defendants, composing the firm of Henry Ames & Co., were engaged in business at St. Louis, Mo., and that Leland & Harbach, commission-merchants, in Chicago, had from time to time bought lots of pork for the defendants on commission; that on the 7th day of July, 1871, the defendant Scudder came to Chicago, at the request of Leland & Harbach, who were then in an embarrassed condition, owing to speculations in grain; that on the same day John L. Hancock delivered to Leland & Harbach 500 barrels of pork, which Leland & Harbach had bought of said Hancock for the defendants, by their request and direc-
80 tion, at $16.25 per bbl., in May, to be delivered in July, of which purchase said Henry Ames & Co. had been duly advised; that in payment of said pork Leland & Harbach gave Hancock their check on the Union National Bank of Chicago for $8,031, and that the charges for inspection & Leland & Harbach's commissions made the total cost of the pork $8,125.

That Leland & Harbach, on the same day, shipped the pork to the defendants at St. Louis, Mo., and that the defendants afterwards received and sold said pork.

The plaintiff, to further maintain the issues on his part, offered evidence tending to prove that at the time the 500 bbls. of pork were received by Leland & Harbach the defendant Scudder was present in the office of Leland & Harbach, and consented to the receipt of said pork, and verbally authorized them to draw on the defendants for the amount due them (Leland & Harbach) for said pork.

To which evidence the defendant objected on the following grounds:

1st. That the evidence was variant from and did not sustain the allegations of the declaration.

2d. That the evidence related to a non-existing bill, and showed no written authority to draw for said pork.

3d. That the authority, if proved, did not authorize a draft for more than $8,031.

4th. That the evidence established no priority of contract between plaintiff and defendants.

The court overruled the objection, and the defendant then and
81 there duly excepted, and the evidence was admitted.

The plaintiff, to further maintain the issues on its part, offered evidence tending to prove that the defendant Scudder, in conversation with Leland & Harbach, on the 7th day of July, 1871, after the drawing of the bill of exchange in question, stated that he would advise his firm of the said bill by telegraph.

To which evidence the defendant objected on the following grounds:

are in the words and figures following, to wit:

1st. That the evidence was variant from and did not sustain the allegations of the declaration.

2d. That it did not tend to prove any promise to accept said bill.

3d. That it did not establish any privity of contract between plaintiff and defendants, and was immaterial and irrelevant.

The court overruled the objection, and the defendant then and there duly excepted, and the evidence was admitted.

The plaintiff, to further maintain the issues on its part, offered evidence tending to prove that a bill of exchange, in words and figures following:

"$8,125.00. "CHICAGO, *July* 7, 1871.

"Pay to the order of Union Nat. Bank eight thousand one hundred & twenty-five dollars, value received, and charge to account of Leland & Harbach.

"To Mess. HENRY AMES & Co.,
"*St. Louis, Mo.*"

82 was, on the 7th day of July, A. D. 1871, presented for discount at the Union National Bank of Chicago by the clerk of Leland & Harbach; that the vice-president of said bank declined to receive said bill and give Leland & Harbach credit therefor without a bill of lading or other security. That the clerk then returned to Leland & Harbach's office, & stated the objections made by the bank to the discounting of said bill; that def't Scudder was in Leland & Harbach's office at the time the clerk so entered and reported said objections, and in the presence & hearing of said defendant said clerk was told by either Leland or Harbach to return to the bank and tell the vice-president that Mr. Scudder, one of the firm of Henry Ames & Co., was then in Chicago, & had authorized the drawing of said draft, and that it was drawn against 500 bbls. pork that day bought by Leland & Harbach for Henry Ames & Co. and duly shipped to them; that the clerk accordingly returned to the bank, and under the statement as directed to the vice-president, who thereupon, upon the faith of said statements that said bill was authorized by defendants, discounted said bill, and the proceeds thereof, less exchange & discount, were passed to the credit of Leland & Harbach, on their account with the bank, and the check given by Leland & Harbach to Hancock, in payment of said pork, was paid out of the proceeds of said draft.

To which evidence the defendant objected on these grounds:

83 1st. That there was no evidence of any written authority to draw, or of any written promise to accept or pay, said bill shown to plaintiff at the time of taking said bill.

2. That there was no evidence of any promise or agreement on part of the defendants to accept said bill.

3. That there was no evidence of any presentment of said bill for acceptance.

The court overruled the objection, and the defendant then and there excepted, and the evidence was admitted.

The plaintiff then offered in evidence the said bill of exchange, with certificate of protest, showing that said bill was presented to the defendants for payment on the 8th day of July, 1871, and duly protested for non-payment, and was returned to the plaintiff, reaching Chicago on the evening of July 10th, 1871.

The defendant objected to the admission in evidence of said bill on these grounds:

1st. That said bill is variant from bill described in declaration.

2d. That there is no evidence in the case of any authority in writing to draw, or of any promise in writing to accept or pay, said bill.

3. That there is no evidence of any refusal to accept said bill.

The court overruled said objection, and the defendant then and there excepted, and the bill and certificate of protest were read in evidence.

84 It was admitted upon the trial that defendants had never paid the bill, but that the bank, after the bill was returned protested, applied thereon the balance then standing on the books of the bank to the credit of Leland & Harbach, which was $2,728.66. It was also admitted by def't Scudder that he telegraphed to his house in St. Louis, in evening of the 7th of July, that draft had been drawn, but directed them to delay payment of draft drawn against pork, and that by a subsequent telegram he directed them not to pay.

No evidence was offered by pl'ff tending to show that defendants, or any or either of them, gave to Leland & Harbach any written authority to draw the draft of July 7, 1871, or made any promise or agreement in writing to accept or pay said draft.

Evidence was offered on the part of the defendant tending to prove that the defendant Scudder did not authorize the drawing of the bill of exchange of July 7, 1871; that he did not know of the drawing of said bill until after it was drawn, and that he did not promise to accept or pay said bill.

In his charge the judge instructed the jury as follows:

"If you find from the evidence that Mr. Scudder, one of the defendants, authorized the drawing of the draft in question, and author-

85 ized the clerk, George H. Harbach, to so state to the vice-president of the bank, and that the said draft was discounted by the bank upon the faith of such statement, such conduct on the part of Mr. Scudder may be considered by you as evidence of ~~no~~ implied promise by the defendants to pay the draft; and it is not necessary for that purpose that Mr. Scudder should have expressly sent word to the bank if such statements were made in his hearing and presence, and no objections made to them by him, that is to say, if he stood by and allowed either Leland or Harbach to send such word to the bank without dissenting therefrom. If you find by a fair preponderance of the testimony that Mr. Scudder knew the pork had been delivered to Leland & Harbach at the time the draft was drawn, and acquiesced in the drawing of the draft, and acquiesced in the word sent to the bank that he had authorized it, you may from such facts find an implied promise by the defendants to pay the draft. It was not necessary that Scudder should go to the bank and state that he had authorized the draft, if you are satisfied that he allowed such statements to be made by the messenger."

To which part of the charge the defendant then and there, and before the jury had retired, duly excepted.

86 In said charge the judge also instructed the jury as follows:

"It being an admitted fact that the defendants have the proceeds of the pork against which this draft was drawn, such fact may also be considered by you as an additional circumstance tending to show a promise on the part of the defendants to pay the draft."

To which part of the charge the defendant then and there, and before the jury had retired, duly excepted.

In said charge the judge also instructed the jury as follows:

"The real issue in this case is whether Mr. Scudder authorized the

drawing of the draft in question, and expressly or impliedly promised to pay it."

To which part of the charge the defendant then and there, and before the jury had retired, duly excepted.

The court further instructed the jury as follows:

"If you find the issues for the plaintiff, you will assess the plaintiffs' damages at the amount due on the draft after deducting the amount due from Leland & Harbach applied by the bank on the draft, the balance stated I believe at $5,396.34, and interest on this sum at 6 per cent. per annum from the date of protest of the draft."

The defendant then and there excepted to so much of said instruction as directed the jury to allow interest.

87 And the jury having found a verdict in favor of the plaintiff for $5,922.45 damages, the defendant entered a motion to set aside the verdict and for a new trial, and assigned the following grounds; which said motion is in words and figures following, to wit:

Motion for new trial.

In the circuit court of the United States for the northern district of Illinois.

THE UNION NATIONAL BANK OF CHICAGO *vs.* WILLIAM H. SCUDDER, IMPLEADED WITH Catherine Ames et al. } Motion for new trial & grounds.

And now comes the said William H. Scudder, defendant, impleaded with &c., and moves that the verdict be set aside and a new trial granted on the following grounds:

1st. The court erred in admitting evidence tending to prove a parol authority from Scudder to Leland & Harbach to daw a bill of exchange on defendants, and in allowing witnesses to testify to conversations between Scudder and Leland & Harbach, in regard to a then non-existing bill of exchange.

2d. The court erred in admitting evidence tending to prove a parol promise to pay a bill of exchange.

3d. The court erred in admitting evidence of conversation be-
88 tween the clerk of Leland & Harbach and the vice-president of the Union National Bank.

4th. The court erred in admitting in evidence the bill of exchange.

5. There was no evidence of any authority to draw, or of any promise to accept, the bill of exchange offered in evidence.

6th. There was no competent evidence before the jury entitling the plaintiff to recover in this suit.

7th. The court erred in giving the following instructions to the jury:

(1.) "If you find from the evidence that Mr. Scudder, one of the defendants, authorized the drawing of the draft in question, and authorized the clerk, George H. Harbach, to so state to Mr. Wheeler, the vice-president of the bank, and that the said draft was discounted by the bank upon the faith of such statement, such conduct on the part of Mr. Scudder may be considered by you as evidence of an implied promise by the defendants to pay the draft, and it is not necessary for that purpose that Mr. Scudder should have expressly sent word to the bank, if such statements were made in his hearing and presence, and no objections made to them by him; that is to say, if he stood by and allowed either

Leland or Harbach to send such word to the bank without dissenting therefrom.

"If you find by a fair preponderance of the testimony that Mr.
89 Scudder knew the pork had been delivered to Leland & Harbach at the time the draft was drawn, and acquiesced in the drawing of the draft, and acquiesced in the word sent to the bank, that he had authorized it, you may from such facts find an implied promise by the defendants to pay the draft. It was not necessary that Scudder should go to the bank and state that he had authorized the draft if you are satisfied that he allowed such statements to be made by the messenger."

(2.) "It being an admitted fact that the defendants have the proceeds of the pork against which this draft was drawn, such fact may also be considered by you as an additional circumstance tending to show a promise on the part of the defendants to pay the draft."

(3.) "The real issue in this case is, whether Mr. Scudder authorized the drawing of the draft in question, and expressly or impliedly promised to pay for it."

(4.) "If you find the issues for the plaintiff, you will assess the plaintiff's damages at the amount due on the draft after deducting the amount due from Leland & Harbach, applied by the bank on the draft, (the balance stated, I believe, at $5,376.34,) and interest on this sum at 6 per cent. per annum from the date of the protest of the draft."

THOMPSON & BISHOP,
Atty's for def't Scudder.

(Endorsed:) Filed March 14, 1873. W'm H. Bradley, cl'k.

90 And said motion, coming on to be heard on the 24th day of March, 1873, was overruled and denied, and the defendant then and there excepted.

And thereupon the defendant moved in arrest of judgment; which motion was overruled, and the defendant then and there excepted.

And inasmuch as the foregoing matters and things do not appear of record in said cause, the defendant prays that this his bill of exceptions may be signed, sealed, and made part of the record in said cause, which is done.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed as of March 24th, 1873. W'm H. Bradley, clerk.

On this day, to wit, the 14th day of April, A. D. 1873, said defendant Scudder, by his attorneys, filed in said clerk's office his bond in said entitled cause; which said bond is in words and figures following, to wit:

Supersedeas bond.

Know all men by these presents that we, William H. Scudder, Aaron W. Fagin, and Nathan Cole, of St. Louis, Missouri, and Matthew Laflin, of Chicago, Cook County, Illinois, are held and firmly bound unto the Union National Bank of Chicago in the full and just sum of ten
91 thousand dollars, to be paid to the said Union National Bank of Chicago, its certain attorney or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 24th day of March, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas lately at a term of the circuit court of the United States for the northern district of Illinois, begun and holden on the 1st Monday of March, A. D. 1873, in a suit depending in said court between the Union National Bank of Chicago, plaintiff, and William H. Scudder, impleaded with Catherine Ames, Hudson C. Carkener, and James L. Pearce, defendants, judgment for five thousand nine hundred and twenty-two dollars and forty-five cents damages and costs of suit was rendered against the said William H. Scudder, impleaded with as aforesaid; and the said William H. Scudder having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Union National Bank of Chicago, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said William H. Scudder shall prosecute said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

92 W. H. SCUDDER. [L. S.]
A. W. FAGIN. [L. S.]
NATHAN COLE. [L. S.]
MATTHEW LAFLIN. [SEAL.]

Approved: H. W. BLODGETT, *Judge.*

(Endorsed:) Filed April 14th, 1873. W'm H. Bradley, clerk.

93 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify that the above and foregoing is a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein the Union National Bank of Chicago is plaintiff, and William H. Scudder, impleaded with Catherine Ames et al., is defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-second day of May, A. D. eighteen hundred and seventy-three, and of our Independence the ninety-seventh year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

94 The United States of America to the Union National Bank of Chicago, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein William H. Scudder, impleaded with Catherine Ames, Hudson C. Carkener, and James L. Pearce, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry W. Blodgett, member of, and sitting as judge of, the circuit court of the United States, this third day of

April, in the year of our Lord one thousand eight hundred and seventy-three.

H. W. BLODGETT, *Judge.*

Received copy of the within citation this 14th day of April, A. D. 1873.

FULLER & SMITH,
Attorneys for Defendant in Error.

95 UNITED STATES OF AMERICA, *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between the Union National Bank of Chicago, plaintiff, and William H. Scudder, impleaded with Catherine Ames, Hudson C. Carkener, and James L. Pearce, defendant, a manifest error hath happened to the great damage of the said William H. Scudder, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and pro-

96 ceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this third day of April, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Circuit court of U. S., northern district of Illinois. Union National Bank of Chicago vs. William H. Scudder, impleaded, &c. Writ of error.

(Indorsement on cover:) No. 243. William H. Scudder, plaintiff in error, vs. The Union National Bank of Chicago. N. Illinois, C. C. U. S. Filed 14th October, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 243.

WILLIAM H. SCUDDER, PLAINTIFF IN ERROR,

VS.

THE UNION NATIONAL BANK OF CHICAGO, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS AND BRIEF FOR PLANTIFF IN ERROR.

JOHN H. THOMPSON,
Att'y for Plaintiff in Error.

CHICAGO LEGAL NEWS CO. PRINT.

Supreme Court of the United States.

No. 243.

WILLIAM H. SCUDDER,
Plaintiff in Error,

v.

THE UNION NATIONAL BANK OF CHICAGO,
Defendant in Error.

Error to Circuit Court of United States for Northern District of Illinois.

STATEMENT, ERRORS AND BRIEF.

Statement of Case.

This was an action in assumpsit, commenced February 14th, 1872, by the Union National Bank against Scudder and the other persons, composing the firm of Henry Ames & Co., of St. Louis, Mo.

Scudder, the only defendant served with process, filed March 4, 1872, a motion to set aside the service and return on the writ, upon the ground that defendant was served while attending the taking of depositions in a case between the same parties, and that improper means were used to bring him within the jurisdiction of the court.

This motion was supported by affidavit and exhibits and affidavits were filed in opposition to it, and on hear-

ing before Judge Blodgett, the motion was denied April 3, 1872, and defendant excepted.

The motions, affidavits and exhibits, are presented in the first bill of exceptions.

Transcript 4–17.

Plaintiff filed its declaration April 5, 1872, containing three special and the common counts.

The first count alleged an acceptance by defendants of a bill of exchange, drawn by Leland & Harbach to the order of plaintiff.

The second count was substantially this: That in consideration that the plaintiff, at the request of the defendants, would discount a bill of exchange before then drawn by Leland & Harbach, whereby Leland and Harbach requested defendants to pay to the order of plaintiff, on demand, $8,125, value received, the defendants promised the plaintiff that they would accept the said bill of exchange, upon the same being presented to them for acceptance; that the plaintiff discounted said bill and afterwards presented the bill to defendants for acceptance, but defendants would not accept the same.

The third count set forth that the defendants, by and through their agents, Leland & Harbach, drew a bill of exchange on themselves for $8,125, value received, payable to order of plaintiff, on demand, and delivered said bill to plaintiff, with averment that plaintiff presented bill for acceptance, and defendants refused to accept, and thereby became liable, etc.

Defendant Scudder then filed a plea in abatement, setting up the pendency of the former suit between the same parties for same cause of action in the United States Circuit Court for Districts of Missouri. To this plea plaintiff demurred. Demurrer was overruled and plaintiff then replied that the former suit was dismissed April 9, 1872. To this replication the defendant demurred, and the demurrer was overruled, with leave to defendant to answer over.

The overruling of the demurrer is assigned for error.

Defendant then pleaded the general issue verified by affidavit and six special pleas.

The second plea set up the Statute of Frauds of the State of Illinois.

The other special pleas set up that the bill of exchange described in the declaration, was drawn on the defendants, or was payable at St. Louis, in the State of Missouri, and that by the laws of Missouri defendants were not liable on the bill, or any promise to accept the bill.

A general demurrer was filed by plaintiff to all the special pleas.

This demurrer was overruled as to the third plea, and sustained as to the other special pleas.

To the third plea, which was a plea to the first count of the declaration, a replication was then filed by plaintiff, to which defendant demurred, and the demurrer was sustained.

Trial.

The parties went to trial before Judge Blodgett and a jury on the second and third special and the common counts, and a plea of the general issue verified by affidavit.

Plaintiff claimed the right to recover the amount of the following draft:

"$8,125.00 Chicago, July 7, 1871.

Pay to the order of Union National Bank eight thousand one hundred and twenty-five dollars, value received, and charge to account of LELAND & HARBACH.

To Messrs. Henry Ames & Co.
St. Louis, Mo."

It was not claimed that defendants had ever actually accepted this draft, or had ever in writing authorized the draft, or had ever made any written promise to accept or pay the bill.

It appeared that for over a year before July 7, 1871, Henry Ames & Co. were in business in St. Louis, Mo.,

and Leland & Harbach, commission merchants in Chicago, bought pork for them from time to time on commission. In May, 1871, Leland & Harbach bought 500 bbls. of pork at $16.25 per bbl. of John L. Hancock, to be delivered in July on account of Henry Ames & Co. This pork was delivered to Leland & Harbach July 7, 1871, and they gave Hancock their check on the Union National Bank for $8.031, and shipped the pork to the defendants, who afterwards received and sold it.

The defendant Scudder was in Chicago July 7, 1871, having come there at the request of Leland & Harbach, who were then in an embarrassed condition, and in the evening of July 7, 1871, telegraphed his firm that draft had been drawn, but directed them to delay payment of draft drawn against pork, and by a subsequent telegram directed them not to pay.

Evidence was offered on the part of the defendant, tending to prove that the defendant, Scudder, did not authorize the drawing of the bill; did not know of the drawing of it until after it was drawn, and never promised to accept or pay it.

Objections were made, and exceptions taken to the admission of evidence offered by plaintiff, and tending to prove that defendant, Scudder, verbally authorized Leland & Harbach to draw on defendant, and told them that he would advise his firm of said bill by telegraph, that the bill in question was taken by the plaintiff, and the proceeds less discount placed to credit of Leland & Harbach, upon the statement of the clerk of Leland & Harbach, that Mr. Scudder, one of the firm of Henry Ames & Co., was then in Chicago and authorized the drawing of said draft, and that it was drawn against 500 bbls. of pork that day, bought by L. & H. for Henry Ames & Co., and shipped to them, which statement said clerk was told to make by Leland or Harbach, in the presence and hearing of Scudder, and the bill with cer-

tificate of protest for non-payment, but without evidence of any refusal of defendants to accept the same, was also admitted in evidence against the objection and exception of defendant.

In his charge to the jury, the court instructed the jury to the effect that they might find a verdict against the defendant, and an implied promise by defendants to pay the bill, if they found that Scudder, verbally or otherwise, authorized the drawing of the bill, and stood by and allowed Leland, or Harbach, to send word to the bank, that he authorized the bill, and from the circumstance that defendants had the proceeds of the pork, against which the bill was drawn, and that plaintiff was entitled to interest from date of protest of draft. Exceptions were taken to these instructions.

The jury found a verdict for plaintiff, defendant moved for a new trial, and in arrest of judgment, both motions being denied, and exceptions taken, and judgment was rendered on the verdict.

Assignment of Errors.

1. The denial of motion to set aside the service of the writ of summons.

Transcript, pages 3-17.

2. The overruling of demurrer to replication to plea in abatement.

Transcript, 21-25.

3. Sustaining demurrer to second plea in bar.

Transcript, 26.

4. Sustaining demurrer to fourth, fifth, sixth and seventh pleas in bar.

Transcript, 26-27.

5. Admission of evidence tending to prove that defendant Scudder verbally authorized Leland & Harbach to draw a bill of exchange on defendants.

Transcript, 34.

6. Admission of evidence tending to prove that Scudder stated to Leland & Harbach that he would advise his firm of bill by telegraph.

Transcript, 34.

7. Admission in evidence of bill of exchange and evidence tending to prove discount of same, by plaintiff, without proof of acceptance or written authority to draw, or written promise to accept or pay bill, and without proof of any presentment of bill for acceptance.

Transcript, 35.

8. The court erred in the following instructions given to the jury by the judge:

(1.) "If you find from the evidence that Mr. Scudder, one of the defendants, authorized the drawing of the draft in question, and authorized the clerk, George H. Harbach, to so state to the Vice-President of the bank, and that the said draft was discounted by the bank upon the faith of such statement, such conduct on the part of Mr. Scudder may be considered by you as evidence of an

implied promise by the defendants to pay the draft, and it is not necessary for that purpose that Mr. Scudder should have expressly sent word to the bank if such statements were made in his hearing and presence, and no objections to them by him; that is to say, if he stood by and allowed either Leland or Harbach to send such word to the bank without dissenting therefrom. If you find by a fair preponderance of the testimony that Mr. Scudder knew the pork had been delivered to Leland & Harbach at the time the draft was drawn, and acquiesced in the drawing of the draft, and acquiesced in the word sent to the bank that he had authorized it, you may from such facts find an implied promise by the defendants to pay the draft. It was not necessary that Scudder should go to the bank and state that he had authorized the draft, if you are satisfied that he allowed such statements to be made by the messenger."

(2.) "It being an admitted fact that the defendants have the proceeds of the pork against which the draft was drawn, such fact may also be considered by you as an additional circumstance tending to show a promise on the part of the defendants to pay the draft."

(3.) "The real issue of this case is whether Mr. Scudder authorized the drawing of the draft in question and expressly or impliedly promised to pay it."

Transcript, 36, 37.

9. Direction of the court to allow interest from date of protest of draft.

Transcript, 37.

10. Denial of motion of new trial.

Transcript, 37, 38.

11. Overruling of motion in arrest of judgment.

Transcript, 38.

JOHN H. THOMPSON,

Atty. for Plff. in Error.

BRIEF.

I.

The first error alleged is the denial of a motion to set aside the service of summons, and is based on affidavits and papers presented in the first bill of exceptions.

The undisputed facts were these: Five months before the commencement of this suit the plaintiff (below) commenced a suit against the same defendants, who were residents of Missouri, for the same cause of action in the Circuit Court of the United States, for the districts of Missouri. The defendants pleaded and a replication was filed, and the cause being at issue, a notice was served on defendants that on the 14th of February, 1872, depositions of witnesses would be taken at the office of Fuller & Smith (plaintiff's attorneys in this suit), in Chicago. Scudder, one of the defendants, believing it necessary for him to be personally present at the taking of such depositions, came to Chicago for the express and sole purpose of attending the taking of such depositions, and while he was present attending the taking of the depositions, at the office of Fuller & Smith, in Chicago, February 14, 1872, an officer entered the office, Scudder was pointed out to him by plaintiff's attorney, and the writ in this case was then served on him, the suit being commenced on the same day.

It was claimed on the part of defendant that he was enticed within the jurisdiction of the Court for the Northern District of Illinois, for the purpose of obtaining service on him, and that the notice to take depositions was given for that purpose.

This was denied on the part of the plaintiff, and three

officers and the attorneys of record of the bank denied any intent to entice the defendant within the jurisdiction of the Court by said notice.

We submit that a court ought not to take jurisdiction of a party on whom service has been obtained under these circumstances, and that the motion to set aside the service was erroneously denied.

Moore *v.* Booth, 3 Vesey, Jr., 350;
Ex parte Jackson, 15 Vesey, Jr., 116;
Wells Admr. *v.* Gurney, 8 Barn. & Cress., 769, 15 E. C. L. 378;
Stein *v.* Valkenhuysen, Ellis B. & E. 65, 96 E. C. L. 63;
Wanzer *v.* Bright, 52 Ill., 35;
Seaver *v.* Robinson, 3 Duer, 622;
Carpenter *v.* Spooner, 2 Sandf. 717;
Williams *v.* Bacon, 10 Wend., 636;
Snelling *v.* Watrous, 2 Paige Ch., 314;
Goupil *v.* Simonson, 3 Abbott Pr., R., 474;
Baker *v.* Walls, 45 Howard Pr., R. 137;
Williams *ads.* Reed, 5 Dutcher, 385;
Salhinger *v.* Adler, 2 Robertson, 704.

II.

Defendant pleaded in abatement the pendency of a former suit between the same parties, and for the same cause of action, in the United States Circuit Court for the Districts of Missouri. Plaintiff demurred to this plea, and demurrer was overruled. Plaintiff then replied that the former suit was dismissed April 9, 1872, (this suit being commenced February 14, 1872). To this replication defendant demurred, and the demurrer was overruled.

"If there was a writ in being at the time of sueing out

the second, it is plain that the second was vexatious and ill *ab initio.*"

Bacon's Abridgment. Abatement M.
Sparry's Case, Coke, part V., 61.
Knight's Case, 2 Ld. Raymond, 1014.
S. C. 1 Salk, 329.
Commonwealth *v.* Churchill, 5 Mass., 174.
Parker *v.* Colcord, 2 N. H., 36.
1 Chitty's Pl. 454.
Frogg's Execs. *v.* Long's Adm., 3 Dana, 157.
Buckles *v.* Harlan, 54 Ill., 361.

III.

Sustaining Demurrer to Second Plea.

This was a plea to the first and second counts of the Declaration, and set up "that the several supposed promises and undertakings in the said first and second counts respectively mentioned were special promises, and each of them was a special promise for the debt of another person, to wit, the said Leland & Harbach, and that neither the promise on which this action was brought, nor any memorandum or note thereof, was or is in writing signed by the party to be charged therewith, or by any other person thereunto by such party lawfully authorized in manner and form as required by the statute of the State of Illinois." This plea varies in no essential particular from a form in Chitty, which was held good on demurrer in

Maggs *v.* Ames, 4 Bingham, 470.

The Statute of Illinois on which this plea was based provides that "No action shall be brought * * * whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person."

Sustaining the demurrer to this plea was clearly error, for which we are entitled to have this judgment reversed. Chitty's Pl., Vol. 3, 909.

IV.

Demurrers to 4th, 5th, 6th and 7th Pleas.

These pleas are similar. The counts of the declaration to which they were pleaded, set up an acceptance and a promise of acceptance, by the defendants, of a certain bill of exchange, drawn on defendants, by Leland & Harbach, to the order ot the plaintiff.

The 4th plea set up that the bill of exchange was drawn on the defendants, and was payable at St. Louis, in the State of Missouri, and that the promise by the defendants to accept the bill, if any such was made, was not in writing, and shown to the plaintiff, and that by the laws of the State of Missouri, said promise was not binding on said defendants.

The 5th plea sets forth that the bills of exchange declared on were, and each of them was, drawn on the defendants, at St. Louis, Mo., that is to say, at St. Louis, in the State of Missouri, and that the liability of the defendants on said bills, and on any acceptance, or promise to accept said bills, depends upon the laws of the State of Missouri, and that there was no acceptance in writing of either of said bills, signed by the defendants, or their agents, and that by the laws of the State of Missouri, defendants are not liable on either of said bills, and the defendant pleads and sets up the laws of the State of Missouri, as a bar to the plaintiff's right to recover.

The 6th plea sets up that the domicil of the defendants, and each and all of them, was at the time when the bills were drawn, and ever afterwards, at St. Louis, in the State of Missouri, and that there was no acceptance of

either of the bills in writing, signed by defendants, or their agents, with an averement that by the laws of Missouri, the defendant was not liable on the supposed promises and undertakings.

The 7th plea alleges that the bills were directed to defendants, at their place of domicil, St. Louis, in the State of Missouri, and that the liability of defendants, on each of the bills, depends on the laws of the State of Missouri, and that there was no acceptance, in writing, of either of the bills, and that by the laws of the State of Missouri, defendant cannot be charged as acceptors.

Transcript 26, 27.

A demurrer was sustained to all these pleas.

We confidently submit that this demurrer was erroneously sustained.

Story's Conflict of Laws, § 280, 318.
Worcester Bank *v.* Wells *et al.*, 8 Metc., 107.
Hunt *v.* Standart, 15 Ind., 33.
Boyce *v.* Edwards, 4 Pet., 123.
Frazier *v.* Warfield, 9 Smeeds & Mar., 220.
Springer *v.* Foster, 2 Story R., 387.

2. Parsons on Notes & Bills V. 1 p. 324

Admission of Improper Evidence.

The 5th, 6th and 7th errors assigned, are based on the admission of evidence, which we claim was incompetent and inadmissible.

This was an action of assumpsit founded on a bill of exchange, drawn by Leland & Harbach on the defendants in favor of plaintiff.

The first count of the declaration, which set up an acceptance of the bill, was disposed of on demurrer.

The second count sets up that defendants promised the plaintiff to accept the bill on presentment for acceptance,

Sustaining the demurrer to this plea was clearly error, for which we are entitled to have this judgment reversed. Chitty's Pl., Vol. 3, 909.

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ADMISSION OF IMPROPER EVIDENCE.

The 5th, 6th and 7th errors assigned, are based on the admission of evidence, which we claim was incompetent and inadmissible.

This was an action of assumpsit founded on a bill of exchange, drawn by Leland & Harbach on the defendants in favor of plaintiff.

The first count of the declaration, which set up an acceptance of the bill, was disposed of on demurrer.

The second count sets up that defendants promised the plaintiff to accept the bill on presentment for acceptance,

a refusal to accept on presentment, and a consequent liability and promise to pay the bill.

The third count alleges that the defendants made and drew the bill, and the declaration contained the common counts.

No evidence was offered that was admissible under the third count, and I think it cannot be claimed that the evidence objected to was admissible under the third, or the common counts, so it only remains to consider whether this evidence was admissible under the second count.

The evidence complained of tended to prove a verbal authority from the defendant Scudder to Leland & Harbach, to draw the bill in question, before it existed, and of acts and circumstances before and after the bill was drawn, tending to prove knowledge of, and consent to the drawing of the bill, and an implied promise to pay the bill, without any evideuce of a presentment of the bill for acceptance, or a refusal to accept, and without evidence of any written authority or promise whatever.

PAROL AUTHORITY TO DRAW OR PROMISE TO ACCEPT.

In England, the law seems settled, that a party is not liable on a parol promise to accept a bill not yet drawn.

Parsons N. & B., 292-3.

Bank of Ireland *v.* Archer *et al.*, 11 Meeson & Welsby, 383.

By the law of France, a promise, even in writing, to accept a not existing bill, does not make a party liable on a bill.

Pardessus, Droit Comm. Tom. 2, Art. 362, 363, 367.

In this country, the law was laid down at an early day, by this Court, in these terms:

"That a letter written within a reasonable time, before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is,

if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

Coolidge *v.* Payson, 2 Wheaton, 66.

The law thus laid down and adhered to in this Court in subsequent cases, seems intended to cover all cases where a party was sought to be charged on an acceptance, an authority to draw, or a promise to accept, without a written acceptance on the bill.

In the law thus laid down, the courts of the different States have generally acquiesced, and in some of the States, the law has been subsequently embodied in statutes.

Schemmelpennich *v.* Bayard, 1 Peters, 283.
Plummer *v.* Lyman, 49 Maine, 229.
Kennedy *v.* Geddes, 8 Porter (Ala.), 263.
Parker *v.* Greele, 2 Wend. 547.,
Pike *v.* Irwin, 1 Sandf., 14.

In Boyce et al. *v.* Edwards, 4 Pet., 111, Mr. Justice Thompson delivered the opinion of the Court, affirming the rule laid down in the 2 Wheaton, and said: "We consider it no longer an open question in this Court; and whenever the holder of a bill seeks to charge the drawee as acceptor upon some collateral or *implied* undertaking, he must bring himself within the spirit of the rule laid down in Coolidge *v.* Payson."

If this is still the law in this Court, this evidence we complain of was inadmissible, and this judgment must be reversed.

The plaintiff seeks to recover upon an implied promise to accept or pay this bill, and he seeks to establish this promise by circumstances and verbal statements. He does not bring himself within the rule laid down in Coolidge *v.* Payson.

Mr. Justice Thompson indulges in a dictum in the case of Boyce *v.* Edwards to the effect that an action

might be maintained on "a count properly framed upon the breach of the promise to accept."

There is no such count in this case.

The second count is substantially the same as the count in Bank of Ireland *v.* Archer, 11. M. & W., 383, where, upon far stronger evidence of a promise to accept, it was held that the plaintiff could not recover.

The 3d count is not on any promise to accept or pay at all, and it cannot be claimed that a recovery can be had on the common counts.

VI.

Exceptions to Charge.

The portions of the charge excepted to are open to the same objections which we make to the admission of evidence. The court instructed the jury that they might find an implied promise by defendants to pay the draft from circumstances and acts of Scudder, while there was no count in the declaration under which such evidence was admissible, and in disregard of the rule laid down in Coolidge *v.* Payson.

VII.

We complain of the instruction of the court to allow interest, and the 10th and 11th errors assigned are to save our rights by a motion for new trial, and in arrest of judgment.

Respectfully submitted on behalf of the plaintiff in error.

JOHN H. THOMPSON,
Attorney, and of Counsel.

Supreme Court of the United States.

No. 243.

THE UNION NATIONAL BANK
OF CHICAGO,
Defendant in Error.

ads.

WILLIAM H. SCUDDER,
Plaintiff in Error.

Brief and Argument for Defendant in Error.

MELVILLE W. FULLER,
Of Counsel for Defendant in Error.

CHICAGO:
PRINTED BY THE CHICAGO LEGAL NEWS COMPANY, 151 AND 153 FIFTH AVE.
1875.

Supreme Court of the United States.

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THE UNION NATIONAL BANK OF CHICAGO, *Defendant in Error.*	*Error to Circuit Court of United States for Northern District of Illinois.*
ads.	
WILLIAM H. SCUDDER, *Plaintiff in Error.*	

BRIEF FOR DEFENDANT IN ERROR.

MAY IT PLEASE YOUR HONORS :

I submit the following observations in answer to the brief on behalf of plaintiff in error :

I.

The first error alleged is the denial of a motion to set aside the service of summons.

Such motions it is within the discretion of the court below to grant or deny, and its action will not be reviewed by this Court. They belong to the same class as applications to amend pleadings, to continue or to reinstate a cause, to open a default, and the like.

But if reviewable on error, there is nothing to the point.

The rule may be conceded that no court will take jurisdiction of a party where it is obtained by fraud, and that no defendant is amenable to process, unless he is in or comes *voluntarily* within the territorial jurisdiction of the court, and it is in support of this rule that the cases cited on behalf of plaintiff in error apply; but the question here is, was W. H. Scudder *enticed by fraud* to come within the jurisdiction? It has been decided by the court below that he was not. Did the court rightfully so decide upon the facts?

The Union National Bank was located at Chicago. Henry Ames & Co. was a firm doing business at St. Louis. The bank was compelled to and did commence suit at St. Louis. Notice was given in accordance with the statutory requirements and the practice of the court, that depositions to be used on the trial at St. Louis, would be taken at Chicago on a given day. To the surprise of the bank and its attorneys, Mr. Scudder, a member of the firm of Henry Ames & Co., came *voluntarily* within the jurisdiction of the United States Circuit Court for the Northern District of Illinois, and appeared upon the taking of the depositions. The bank accordingly commenced suit against Ames & Co. at Chicago, and process was served upon Mr. Scudder. The suit at St. Louis was subsequently dismissed. Both suits might have lawfully been prosecuted at the same time, as we shall presently see.

The officers of the Union Natioal Bank were William F. Coolbaugh, President; C. T. Wheeler, Vice-President; G. A. Ives, Cashier. Its attorneys at Chicago were Melville W. Fuller and Joseph E. Smith, composing the firm

of Fuller & Smith. Its attorneys at St. Louis were Geo. W. Lubke and Preston Player, composing the firm of Lubke & Player. Mr. Coolbaugh testifies that "he never in any way advised, suggested, or thought of procuring said depositions to be taken, or of notifying said defendants or their attorneys of the taking thereof, *for the purpose of enticing said defendants, or either of them, within the jurisdiction of said Circuit Court* for said Northern District of Illinois; nor did any conversation or correspondence ever take place between him and said attorneys, or either of them, in relation thereto; that he believes, and in his belief states the fact to be, that the said depositions are taken in good faith and in the usual and ordinary way, according to the rules and practice of said Circuit Court for the Districts of Missouri, and without collusion, or any the slightest intent or desire to obtain any undue advantage over the said defendants, or either of them.

Affiant says further that upon being informed that Wm. H. Scudder, one of said defendants, was in the city on said 14th day of February, he did, as president of said plaintiff bank, telegraph in the forenoon of said day to Messrs. Lubke and Player, attorneys of said Bank, at St. Louis as aforesaid, for the full names of said defendant's firm, for the purpose of instituting a suit against said firm in this honorable Court; that he has always believed, and now does believe, that the cause of justice will be better subserved by having said suit determined in this district, where all the witnesses, with the exception of the said defendant, Scudder, reside, and where the benefit of their oral testimony can be had; and that the said suit was directed to be brought by him on said 14th day

of February, A. D. 1872, with that view, and no other; and *he distinctly denies any and all collusion or improper conduct in this regard*, on his own part or on that of any officer or officers of said bank, or the attorneys thereof, or either of them, so far as he has any knowledge, information or belief." (Printed Record, p. 12.)

Mr. Wheeler (p. 12), and Mr. Ives (p. 14), testify to the same effect.

Mr. Coolbaugh also adds (as does Mr. Wheeler), that the affidavits of the witnesses, whose depositions were to be taken, were read to Mr. Carkener, one of the defendants, prior to the bringing of the suit in Misscuri.

Mr. Player (p. 14) and Mr. Lubke (p. 16) deny all collusion, and say the notice to take depositions was *according to the practice in the Missouri United States Circuit Court*, and was given by their law firm of their own motion, for the purpose of preparing said cause for trial, and not at the suggestion of the bank, or of Fuller & Smith, and that they had no thought or expectation that either or any of said defendants would be present at the taking of said depositions, etc.

Messrs. Fuller & Smith stated (p. 17) upon their professional honor (which was taken in lieu of an affidavit) that they had not enticed or caused to be enticed, said Scudder, within the jurisdiction, and had no expectation that said Scudder would be present in Chicago at the time, and that they were causing the depositions to be taken in good faith, to be used at St. Louis, etc.

As against this clear and convincing testimony, Mr.

Scudder interposes his affidavit, that he *believes* the notice was given to entice him within the jurisdiction, and that his personal presence was necessary at the taking of said depositions to protect the defendant's rights (p. 7).

So far as Mr. Scudder's belief that the notice to take depositions was a trick, is concerned, it is shown by Messrs. Coolbaugh, Wheeler, Ives, Fuller, Smith, Player and Lubke, to have been baseless, and so far from there being any necessity for his presence, Messrs. Coolbaugh and Wheeler show that the affidavits of Mr. Wheeler, and of Messrs. Hancock, Leland and Harbach, whose depositions were to be taken, had been previously taken and read to the defendants at St. Louis *before any* suit was commenced, so that they knew all about the evidence it was proposed to adduce, and could have instructed counsel at Chicago, without difficulty. (See particularly Mr. Wheeler, p. 13).

The fact that Mr. Coolbaugh had to telegraph to St. Louis for the names in full, of the members of Henry Ames & Co., is in itself, decisive that *this* suit was not preconcerted.

It thus satisfactorily appearing that suit in Illinois was commenced because, and simply because, the defendant, Scudder, came voluntarily within the jurisdiction, and not the slightest element of fraud existing, how can it be held that the Circuit Court was wrong in denying the motion to set aside the service?

The test upon such a question, and the only test is, whether the plaintiff was guilty of fraud in the premises, and there is no pretense of that here.

In *Carpenter* v. *Spooner*, 2 Sandford, 716, the court say: "If a party who is not within the jurisdiction, voluntarily come within it, he thereby becomes amenable to the process of the court, but not unless he comes voluntarily."

See also *Williams* v. *Bacon*, 10 Wend., 646.

Moore v. *Booth*, 3 Vesey, jr., 350; *Jackson*, *Ex parte*, 15 Vesey, jr. 116; *Snelling* v. *Watrous*, 2 Paige Ch., 314; *Wells* v. *Gurney*, 8 Barn. & Cress., 769; *Stein* v. *Valkenhuysen*, Ellis B. & E., 65; and *Salhinger* v. *Adler*, 2 Robertson 704; were cases of *arrest* and not of ordinary service of process. *Wanzer* v. *Bright*, 52 Ill., 35; *Williams* ads. *Reed*, 5 Dutcher, 385; *Goupil* v. *Simonson*, 3 Abb. Pr. R. 478; *Seaver* v. *Robinson*, 3 Duer, 622, and so on, are cases of jurisdiction attempted to be obtained by fraud. And most if not all these were cases where the individual was attending *an actual trial or hearing*, either as a witness or party.

Not an authority can be found to sustain the position, that if a party come voluntarily within the jurisdiction, service of a summons in a civil action will be set aside.

II.

The second error assigned, is the overruling of the demurrer of defendant below, to the replication of plaintiff below to the plea in abatement.

The defendant Scudder, on May 6th, 1872, filed his plea in abatement, setting up the pendency of a former suit between the same parties, and for the same cause of

action, in the United States Circuit Court, for the Districts of Missouri. (*Printed Record*, p. 21).

The plaintiff bank, demurred to this plea, and its demurrer was overruled, but leave given to withdraw it, and to reply to said plea. (*Printed Record*, p. 23).

Thereupon the plaintiff filed its replication, that on the 9th day of April, A. D., 1872, the same being one of the days of the April Term, 1872, of the Circuit Court of the United States for the Districts of Missouri, the suit mentioned in defendant Scudder's plea in abatement, was dismissed out of said court, etc. (p. 24).

Defendant demurred to this replication, and the demurrer was overruled, whereupon the defendant plead to the merits. (p. 25).

The overruling of the demurrer to the replication was correct.

1. If the dismissal of the Missouri suit had been *after* plea of its pendency pleaded, and the replication had so stated, the replication would not have been open to demurrer.

"Upon the plea or answer of the defendant showing the pendency of the first suit, it is competent for the plaintiff to discontinue the first suit, and a replication of such discontinuance is a good answer to the plea."

Averill v. *Patterson*, 6 Selden, 500, and cases cited.

A manuscript opinion of Judge DRUMMOND, not now before me, lays down the same rule.

2. But the suit in Missouri was dismissed April 9, 1872, while the plea in abatement was filed May 6th, and therefore the plea could not, as it *did not*, contain any averment that the alleged "former suit" was *then* pending.

The plea was therefore *bad*, and the demurrer of the bank to it ought to have been sustained, and when the defendant Scudder demurred to the bank's replication, *that* demurrer should have been carried back to the plea.

It is clear that, as the plea must state the *then* pendency of the prior suit, a replication averring that it was *not* pending *when the plea was filed*, is a complete answer to the plea, if the latter be properly drawn. If the plea be defective in this particular, the pleader cannot complain that *because* his plea is bad the replication is.

A plea of suit pending should contain an averment that the former suit is pending *at the time of the filing of the plea.*

Bancroft v. *Eastman*, 2 Gil. (Ill.) 259.
Clifford v. *Corey*, 1 Mass., 495.
Green v. *Watts*, 1 Ld. Raymond, 274.
Marston v. *Lawrence*, 1 Johns. Cases, 397.

Such is the language of the precedents.

3 *Chitty Pl.*, 903, *904.
Lilly's Entries, Brown and Deeble, p. 7.

3. The plea in abatement presented no defense upon its face.

The pendency of a suit in one State, cannot be pleaded in bar or abatement of a second action in another State,

between the same parties and for the same cause of action.

McJilton v. *Love*, 13 Illinois, 494.
White v. *Whitman*, 1 Curtis, 491.
Lyman v. *Brown*, 2 Curtis, 559.
Davis v. *Morton*, 4 Bush, 442.
Seevers v. *Clement*, 28 Md., 426.
Yelverton v. *Conant*, 18 N. H., 123.
Hatch v. *Spafford*, 22 Conn., 485.

Nor in the United States Circuit Court pendency of a suit in a State court.

Loring v. *Marsh*, 2 Clifford, 311.

It seems to follow that a suit pending in the United States court in *another* State cannot so be pleaded. In the case of different districts, *in the same State*, the rule may be different, as *process* mesne or final could run from one into the other and the remedy wouldbe substantially the same, but this cannot apply as between United States Court in different States, unless so far as proceedings *in rem* as bankruptcy, etc., are concerned.

In *Lyman* v. *Brown*, *supra*, Judge CURTIS says: "It seems to me that the ground upon which the plea of a prior suit pending has been held to be sufficient to abate the second suit, is not applicable, where the second suit is pending in a foreign country, or even in another State of this Union. That ground, I understand to be, that the defendant shall not be twice ~~vexed~~ vexed for the same cause of action, where the court can see that in each, the remedy is substantially the same. Thus a writ of right is not abated by the pendency of a writ of entry for the same

land. Com. Dig., Abatement, H., 24. Nor trespass in C. B. by replevin in the Sheriff's Court. *White* v. *Willis*, 2 Wil. 87. Nor an action by assignees of a bankrupt by a prior suit by the bankrupt. *Biggs et al.* v. *Cox*, 4 B. and C. 920. And where a distinct jurisdiction is sought, whose process, as to person or property, may *obtain a satisfaction not within the reach of that in the first suit, how can the court* see that the remedy is *substantially the same?*"

Although not necessary to the decision of this case, or even of the particular error now under consideration, it is desirable that a ruling should be had on this last mentioned point, that the practice may be settled in future.

III.

The third error assigned, is the sustaining of the demurrer to the second plea, and *the fourth*, sustaining demurrer to the fourth, fifth, sixth and seventh pleas.

I shall hereafter show that the verdict was properly rendered under the common counts, and as justice was done, the judgment should be affirmed upon well settled principles, even if these errors were well assigned, which, however, they are not.

The declaration contains three special and the common counts.

The first count set up the acceptance of the bill of exchange therein described, and to it in addition to the general issue, and the second, fifth, sixth and seventh special pleas, the defendant interposed the *third* special plea to the effect that the bill declared on was directed to defend-

ants and payable at St. Louis, in the State of Missouri, and that by the laws of Missouri an acceptance to be valid, must be in writing. (P. Rec. p. 26.) The demurrer to this third plea, was overruled by the court (P. Rec. p. 28,) and plaintiff replied (p. 29,) and a demurrer was sustained to the replication (p. 32). This practically disposed of the first count, and the cause was tried upon the second, third and common counts.

The second count set up a *promise to accept*, and *the breach thereof*, and the third count charged the defendants as *drawers of the draft*, by their agents Leland and Harbach.

To the second count, the defendant, in addition to the general issue, plead the second, fourth, fifth, sixth and seventh pleas. (Printed Record, p. 28.)

The second plea set up the *Illinois* statute of frauds to the first and second counts.

The demurrer was properly sustained because the plea was equivalent to the general issue, and because the statute of frauds presented no defense to the action.

In Illinois the law is well settled that a parol promise to accept an existing bill is valid and amounts in law to an acceptance.

Jones v. *C. Bluffs Bank*, 34 Ill., 319.

And that this is equally so as to a non-existing bill.

Nelson v. *First National Bank*, 48 Ill., 39.

It seems now to be settled on authority that an accept-

ance need not be in writing except where so required by statutory provisions.

1 *Parsons on Notes and Bills*, 285, and cases cited in notes.

Barnet v. *Smith*, 10 Foster, 256.

Ontario Bank v. *Worthington*, 12 Wend., 593.

Mason v. *Dousey*, 35 Ill., 424.

Whether the action of defendant Scudder amounted to acceptance or not, it is unnecessary to consider in this connection, as the first count was otherwise disposed of.

But the second count was on a breach of *a promise* to accept, the bill being taken upon the credit of such promise, and the statute of frauds was clearly no defense.

Such a promise, said Mr. Justice STORY, in *Townsley* v. *Sumrall*, 2 Peters, 182, "is an *original* promise to the purchaser, not merely a promise for the debt of another," and hence not within the statute of frauds.

"A parol promise to accept or pay a non-existing bill is no more within our statute of frauds, than would be a similar promise to pay an existing bill, and clearly neither is within the statute."

Mr. Justice LAWRENCE, *Nelson* v. *First N. Bank*, 48 Ill., 41.

plea of

The bill in this case was an existing bill, and it is certain that the Illinois statute of frauds furnished no answer to the second count, and the demurrer to it was properly sustained. As the plea ran to the first *and* second counts, if demurrable, because presenting no defense to the *second* count, it would not be held good as to the first,

but this is not material to be considered, as the first count cuts no figure. Observations next to be made will further serve to illustrate the correctness of the Court's action as to the second plea.

The fifth, sixth and seventh pleas were to the first *and* second counts, and aver that there was *no acceptance* in writing, as by the laws of Missouri there should have been, to hold the defendants. These pleas were manifestly no answer to the *second* count, which was on a breach of *the promise to accept*, and the demurrer was therefore properly sustained as to them, even had they been good as to the first count, which I think they were not. They were also demurrable on the same ground as the fourth plea. This fourth plea was as follows: "And for a further plea in this behalf, as to the second count of the said plaintiff's declaration, the said defendant Scudder, impleaded with, etc., says, actio non, etc., because he says that the said bill of exchange in second count mentioned, was drawn upon the said defendants, and was payable at St. Louis, Mo., that is to say, at St. Louis, in the State of Missouri; and that the promise of said defendants to accept the said bill of exchange in said second count mentioned, if any such promise was made, was not in writing, and shown to the said plaintiff, and that by the laws of the State of Missouri, said promise was not binding upon said defendants, and this the said defendant is ready to verify. Wherefore he prays judgment, etc."

1. This plea seems to be insufficient, in omitting to state specifically that the laws of Missouri required a promise to accept to be in writing to be binding, or to set

out the provisions of the law, which, in the pleader's judgment, would defeat the second count.

2. But an action for the breach of a verbal promise to accept would lie in Missouri.

I find in Wagner's Missouri Statutes, 1872, vol. 1, p. 214, the following, which had evidently been upon the Statute book, for some years:

SEC. 1. No person within this State shall be charged as an acceptor of a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent.

SEC. 2. If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration.

SEC. 3. An unconditional promise in writing, to accept a bill before drawn, shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who, upon the faith thereof, shall have received the bill for a valuable consideration.

SEC. 4. Every holder of a bill presenting the same for acceptance, may require that the acceptance be written on the bill, and a refusal to comply with such request shall be deemed a refusal to accept, and the bill may be protested for non-acceptance.

SEC. 5. The preceding sections shall not be construed to impair the right of any person *to whom a promise to accept* a bill may have been made, and who, *on the faith of such*

promise shall have drawn or negotiated the bill, *to recover damages* of the party making such promise *on his refusal to accept such bill.*

The second count is neither more nor less than a count for breach of promise to accept. It avers the promise to the plaintiff, and that the plaintiff in reliance thereon discounted the bill, "but the said defendants did not nor would when the said last mentioned bill of exchange was presented to them for their acceptance as aforesaid, and when they were as aforesaid requested to accept the same, or at any other time, accept the said last mentioned bill of exchange, but then, and always thereafter, wholly neglected and refused so to do, and thereby the said plaintiff has wholly lost the said sum of money so advanced by it as aforesaid, and the said bill of exchange is wholly unpaid to plaintiff."

The breach thus assigned is a breach of the promise to accept.

The pleader added that by means of the premises, the defendants became liable to pay the said sum of money, in the bill of exchange specified, but this was clearly surplusage.

In the case of *Bank of Ireland* v. *Archer*, 11 M. and W. 387, the point reserved was whether a parol promise to accept a foreign bill of exchange *before it was drawn*, amounted to an acceptance.

It was held that it does not, but that as to an existing bill, it does.

In the case at bar the *bill was in existence*, and this is so averred in the second count.

There is no doubt whatever, that in this country an action will lie for the breach of the promise to accept, and that was what this part of the declaration was counting on.

It is not an open question in this court.

Townsley v. *Sumrall*, 2 Peters, 183.
Boyce v. *Edwards*, 4 Peters, 111.

As under the laws of Missouri the action would have lain, that in itself disposes of this plea.

3. The object of this 4th plea (as of the 5th, 6th and 7th pleas) is, however, to present the question, that as the bill was payable in Missouri, and as under the laws of Missouri, to charge a person *as acceptor*, the acceptance must be *in writing*, an action could not be maintained *in Illinois upon the bill*, against the defendants *as acceptors* under a declaration counting on an acceptance, or a promise to accept as an acceptance.

We have already seen that the second count was in legal effect a count, not upon the bill, but upon a breach of promise to accept; in other words, a count for non-acceptance after agreement to do so, and such a count would have been maintained in Missouri.

But treating the second count as *upon the bill itself*, and as setting up a liability resulting from non-acceptance merely, the bill having been discounted upon the faith of the promise to accept, this would render it if so consid-

ered, practically a count upon an acceptance, differing from an ordinary count of that character, simply in the statement of that which *constituted* the acceptance.

Now, the first count confessedly declared upon an acceptance, and the third plea was held good as to it, in which the court below erred, because the laws of Missouri furnished no defense to either these counts, assuming them both to have been against the defendants as acceptors.

Illinois being the place of the *actual* making and of the forum, the law of the expected place of performance could not be invoked to defeat the action.

The *lex fori* concurring with the *lex contractus*, never yields to the *lex solutionis*.

I repeat that in Illinois the law is settled that a parol promise to accept an existing or a non-existing bill is a virtual acceptance.

Nelson v. *First N. Bank*, 48 Illinois, 39.
Mason v. *Dousay*, 35 Ill., 424.
Jones v. *Bank*, 34 Ill., 319.

And that as to existing bills this is the general rule in England and this country, where statutes have not intervened.

Bank of Ireland v. *Archer*, 11 M. and W., 389.
1 *Parsons on Notes and Bills*, 285.

Now assuming that this is not so in Missouri, is the court in Illinois bound to enforce the law of Missouri, when Illinois is the place where the contract was actually

entered into? Clearly not, and *all* the special pleas were insufficient in law.

Mr. Parsons, in his work on Notes and Bills, 2d vol. p. 324, asserts that, "if a bill or note be payable in a particular place, it is to be treated as if *made there*, without reference to the place at which it is written or signed or dated."

This is the general rule, and rests upon the assumption, that the parties contracted with reference to the *lex loci solutionis*.

But in his work on Contracts (2d vol., 5th Ed. p. 583) Mr. Parsons says: "It would seem from the authorities, that a contract may have *two different places*, the law of which enters into its construction. If it be expressly payable, or to be otherwise performed, there, where it is signed, then that is its only place. If it be but a naked promise, without any special condition as to the place of payment, then it must be demanded of the maker where he is, or at his domicil, but it would be regarded as made where it was signed. *If expressly payable* at a place other than that where it is made, it would seem, according to some authorities, that the law of *either* place may be applied," and he expresses his concurrence with this view. To the same effect is the decision of this court in *Miller* v. *Tiffany*, 1 Wallace, 310, where after stating that contracts are to be governed by the law of the place of performance, and if the interest allowed by the law is higher than that permitted *at the place of the contract*, the parties may so stipulate without incurring the penalties of usury Mr. Justice SWAYNE says: "The converse of this propo-

sition is also well settled. If the rate of interest be higher *at the place of the contract* than at the place of performance, the parties may lawfully contract in that case also for the higher rate. * * * *The validity of the contract* is determined by the *law of the place* where it is entered *into*. Whether void or valid there, it is so everywhere."

Depau v. *Humphrey*, 20 Martin, 1.
Chapman v. *Robertson*, 6 Paige, 634.

The distinction between the place of *actual* making, and the place of performance, is pointed out by Mr. Chief Justice TANEY, in *Andrews* v. *Pond*, 13 Peters, 78, and he says that in the case of *bona fide* agreements "made in one place, to be executed in another," they being permitted by the *lex loci contractus*, "will even be enforced there *if the party is found within its jurisdiction.*"

In *Lanusse* v. *Barker*, 3 Wheaton, 147, it is ruled that authority being given to draw bills *from* a certain place on account of advances there made, the undertaking is *to replace the money at that place.*

In *Adams* v. *Robertson*, 37 Ill., 59, the Supreme Court of Illinois distinctly held in an able opinion, that contracts will be enforced when valid by the laws of *either* the place of actual making or of performance. The contract if valid where made would not *there* be held invalid, even though it might be at the place of performance.

Mr. WHARTON writes: "The rule adopted in England and America, as exhibited in the above cases, is that the law of the country where a contract is made or is to be

performed, furnishes the rules for expounding the nature and extent of its obligation; but the law of the country where *it is sought to enforce* performance of a contract governs all questions as to the remedy and mode of proceeding, including lapse of time. *Ferguson* v. *Fyffe*, 8 C. and F. 121. The law of the place of the *enforcement of a contract*, it has been ruled in the House of Lords, is that which governs the admissibility of evidence on the trial arising from the enforcement of such contract. Bain *v.* Whitehaven, R. C., 3 H. L. Cases, 1."

Wharton on Conflict Laws, p. 401, Note O.

After a luminous discussion of the whole subject, MR. WHARTON states this conclusion: "Such is the tenor of present juridical discussion on the difficult but important question of the territorial seat of obligations. The following proposition is now submitted as that by which the authorities can be best harmonized, and the most judicious result reached. OBLIGATIONS, IN RESPECT TO THE MODE OF THEIR SOLEMNIZATION, ARE SUBJECT TO THE RULE *locus regit actum;* IN RESPECT TO THEIR INTERPRETATION, TO THE *lex loci contractus;* IN RESPECT TO THE MODE OF PERFORMANCE, TO THE LAW OF THE PLACE OF PERFORMANCE. BUT THE *lex fori* DETERMINES WHEN AND HOW SUCH LAWS WHEN FOREIGN ARE TO BE ADOPTED, AND IN ALL CASES NOT SPECIFIED ABOVE SUPPLIES THE APPLICATORY LAW."

Conflict of Laws, p. 346, § 401 p.

As a mere question of pleading, it is clear that *all* the special pleas were bad, and the court not only did not err in sustaining demurrers to the 2d, 4th, 5th, 6th and 7th pleas, but did err in not likewise holding the 3d plea insufficient, as it assuredly was.

V.

The 5th, 6th and 7th errors assigned relate to the admission of certain evidence.

If the evidence were admissible under *any* of the counts in the declaration, the objections thereto were properly overruled.

The first count was against the defendants as acceptors. To this the general issue was pleaded and the third special plea, to which a demurrer was interposed and overruled. The plaintiff replied and a demurrer to its replication was sustained. We have just seen that the 3d plea was bad and furnished no answer to the first count.

The case made established an acceptance, and justified a recovery under the first count.

If the evidence complained of were admissible under this count, will this court reverse the judgment because the court below erred *as against the plaintiff* in overruling the demurrer of the latter to the 3d plea? In other words, the first count not having been itself demurred to and adjudged insufficient, and being in every respect sufficient, and the testimony establishing a case under it, is that evidence to be held incompetent because the court below *erroneously* held the laws of Missouri a defense, there being no dispute as to the facts?

The second count was on a breach of promise to accept, which, in the case of a bill payable *on demand* as this was, is the same as a breach of a promise to pay, and the evidence excepted to when taken (as it must be)

performed, furnishes the rules for expounding the nature and extent of its obligation; but the law of the country where *it is sought to enforce* performance of a contract governs all questions as to the remedy and mode of proceeding, including lapse of time. *Ferguson* v. *Fyffe*, 8 C. and F. 121. The law of the place of the *enforcement of a contract*, it has been ruled in the House of Lords, is that which governs the admissibility of evidence on the trial arising from the enforcement of such contract. Bain *v.* Whitehaven, R. C., 3 H. L. Cases, 1."

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The second count was on a breach of promise to accept, which, in the case of a bill payable *on demand* as this was, is the same as a breach of a promise to pay, and the evidence excepted to when taken (as it must be)

with the other evidence in the case, was clearly admissible.

Where a bill is payable so many days after sight or date, it needs presentment for acceptance, and acceptance, and this is usually so where it is payable *at sight*, although *not* so in Missouri.

When it is *on demand*, it needs presentment for *payment* only. Days of grace are allowed in the one case and not in the other.

1 *Parsons on Notes and Bills*, 404.

The Missouri statute is as follows: "Every bill of exchange, draft or order, drawn either within this State *or elsewhere*, upon any person residing within this State, payable on its face *at sight* or *on demand*, shall be deemed and considered to be due and payable on the day it is presented or demanded, any usage or custom here or elsewhere to the contrary notwithstanding; and if *not so paid, may be protested for non-payment.*"

Wagner's Statutes, Chap. 18. § 18.

Practically a promise to accept *demand* paper is a promise to pay, and a promise to pay and a promise to accept alike *amount to an acceptance.*

"A promise to accept an existing bill" said Lord Ellenbrough, "*is* an acceptance. A promise *to pay it is also an acceptance.* A promise therefore to do ~~this~~ one or the other, *i. e.* to accept or certainly pay, cannot be less than an acceptance."

Wynne v. *Raikes*, 5 East., 514.

Considered as on the bill itself, the second count is merely equivalent to a count on an acceptance. Considered as for damages, the damages are claimed for a breach of promise to accept, which in legal effect, is a promise to pay.

My friend for the plaintiff in error, insists there was *no evidence of a presentment for acceptance*, but he did not object to the certificate of protest which showed that the bill *was presented to the defendant for payment* on the 8th of July, 1871, and *duly protested for non-payment.* By the laws of Missouri it is provided that "a notarial protest is evidence of a demand and refusal to pay a bill of exchange or negotiable promissory note at the time and in the manner stated in such protest."

Wagner's Statutes, Chap. 18, § 20.

Such is now the common law because the protest is required by the custom of merchants.

Townsley v. *Sumrall*, 2 Peters, 179.

The fact that the bill was presented for payment and duly protested, was not denied in the court below, and will not be here. There was abundance of evidence of the fact not set forth in this record, and not necessary to be so, because there was and is no dispute regarding it.

Now *presentment for payment* is all that can be required in the instance of *demand* paper. The presentment for acceptance is nothing but presentment for payment where the drawee has agreed or is bound to pay on demand.

And in the case at bar the Bank could not have been obliged to submit to any qualified or conditional accep-

tance. The bill was discounted as payable on demand, on the faith of *a promise to comply with its terms.*

Evidence of a presentment for acceptance as contradistinguished from a presentment for payment, was wholly unnecessary, and the facts in evidence constituted no *variance* under the second count.

The suggestions of counsel savor of adherence to the bark.

The evidence objected to was admissible under the common counts, and I think under the third count, but this can be more conveniently considered hereafter.

The rule is laid down in *Bank of Ireland* v. *Archer*, 11 Meeson and Wellsby, 383, that "a promise to accept a bill not yet drawn does not amount to an acceptance of it, although the bill be discounted for the drawer on the faith of such promise," and the reasoning of the court applies this rule to a written as well as verbal promise, any distinction between which is pronounced to be "entirely exploded," but it is also stated in the opinion that the doctrine is "*not now disputed*" that a promise to honor an *existing bill* operates as an acceptance.

This is thoroughly settled in the United States, whether the promise be by parol or in writing.

Mason v. *Dousey*, 35 Ill., 424;
Jones v. *C. B. Bank*, 34 Ill., 313;
Hough v. *Loring*, 24 Pick., 254;
Ward v. *Allen*, 2 Met., 53;
Bank v. *Woodruff*, 34 Vt., 92;
Leonard v. *Mason*, 1 Wend., 522.

"An acceptance" said STRONG, J., in *Spaulding* v. *Andrews*, 12 Wright, 411, "is a promise to pay to any one who may thereafter become the holder, and the legal effect is the same, whether it be in parol or in writing."

The promise to accept need not be expressed in words, it being well settled "that any conduct on the part of the drawee by which he intends the holder to understand that he means to accept or pay," or as it has been some times, and perhaps more accurately expressed, any act *giving credit* to the bill, will amount to an acceptance.

Byles on Bills, * 149;
Williams v. *Winans*, 2 Green, (N. J.) 339;
Lannan v. *Smith*, 7 Gray, 150;
The Bank v. *Woodruff*, 34 Vt., 89;
Storer v. *Logan*, 9 Mass., 56.

The bill in the case at bar was an existing bill. I notice this seems to be denied by counsel, though upon what ground I can not conjecture, as the proof showed that the Bank declined to discount it until after the assurance was given to Mr. Scudder's knowledge, and presumably with his consent, that he had authorized it to be drawn.

But suppose it had been a bill *to be drawn*, still the promise would have been binding as an acceptance, if taken on the faith and credit of such promise.

Nelson v. *First Nat. Bank*, 48 Ill., 39;
Bissell v. *Lewis*, 4 Mich., 450.
Crowell v. *Van Bibber*, 18 La. An., 657.
Williams v. *Winans*, 2 Green, 339.

There seems to be no solid ground for the distinction between a written and a parol promise, where not within

the statute of frauds, except where the statute requires the acceptance to be in writing, which it does not in Illinois.

The leading case of *Coolidge* v. *Payson*, 2 Wheaton, 66, is cited as to the contrary, but I do not concede that anything there said by the eminent jurist who delivered the opinion, was intended to operate as a limitation. The maxim *expressio unius exclusio alterius* does not apply,

The decision was that a person would be held liable as *on an acceptance* where he had written a letter within a reasonable time, either *before* or *after* the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, if the bill were taken on the credit of the letter.

It does not follow that the court intended to hold that a parol promise to pay a particular bill drawn or to be drawn, would not also bind as a virtual acceptance, or that there could be no state of facts, other than those named, which would constitute a virtual acceptance.

Thus there is a class of cases where the act of drawing itself constitutes acceptance as where a person draws a bill upon himself.

Cunningham v. *Fairfield*, 3 Fairf., 466.
Roach v. *Ostler*, 1 Man. and R., 120.

In like manner, a draft drawn by an agent on his principal for the account of the latter, under an authority given by him, is *accepted by the very act of drawing.*

Van Reinsdyke v. *Kane*, 1 Gallison, 830, 9 Cranch, 153.
Hasey v. *The Beet Sugar Company*, 1 Douglas (Mich.), 193.

And the acceptance of a consignment drawn against is equivalent to a promise to accept.

1 *Parsnos on Notes and Bills*, 291.

In the case at bar, Mr. Scudder authorized the drawing of the bill, and it may therefore be considered as drawn by the defendants (by their agents) on themselves. It was drawn against a consignment which Ames & Co. received, and the proceeds of which they appropriated, and upon both grounds it might well be held an acceptance.

And it should not be forgotten that the parties to this action are the parties to *the original transaction*, as was the case in *Pillans* v. *Van Mierop*, 3 Burrow, 1663, in which case Lord MANSFIELD declared that "if a man agrees that he will do the formal part, the law looks upon it in the case of the acceptance of a bill, as actually done."

It is, however, well settled that an authority which fails as an acceptance, is valid as a promise to accept, not only as between the original parties, but in favor of any one who gives value on the faith of the assurance which it holds forth.

Townsley v. *Sumrall*, 2 Peters, 170;
Boyce v. *Edwards*, 4 Peters, 111;
Lonsdale v. *The Bank*, 18 Ohio, 126;
Carnegie v. *Morrison*, 2 Met., 381;
Baring v. *Lyman*, 1 Story, 396;
Russell v. *Wiggin*, 2 Story, 240.

"If a person undertake, in consideration that another will purchase a bill already drawn, *or to be thereafter drawn*, and as an inducement to the purchase, to accept it, and

the bill is drawn and purchased upon the credit of such promise, for a sufficient consideration, such promise to accept is binding upon the party," says Mr. Justice STORY, in *Townsley* v. *Sumrall*, *supra*.

The objection to the evidence could not prevail under either of the first two counts.

So far as the *third* count is concerned, it seems fairly sustainable upon the facts shown.

In the case of an authorized draft of an agent upon his principal or the draft of a person upon himself, the instrument may be considered as that of the drawee himself.

"Such instruments are," says Parsons, (1 Notes and Bills, 288) "in legal effect promissory notes."

The third count was properly framed as against the defendants as makers.

As to the common counts there can be no doubt whatever, that a recovery could be had, nd the evidence was admissible thereunder.

These included counts for "goods, wares and merchandize, sold and delivered," for money, "had and received," "lent and advanced," "paid, laid out and expended," "account stated," and for "interest."

The action for money had and received may in general be sustained by any legal evidence showing that the defendant has received or obtained possession of money which in equity and good conscience he ought to pay over to the plaintiff.

2 *Greenl. Ev.*, p. 98, § 117.

A cash draft accepted verbally may be given in evidence under a count for money had and received in an action by payee against acceptor.

Wells v. *Bingham*, 6 Cushing, 6;
Osgood v. *Parsons*, 4 Gray, 455.

And such count is supported by evidence that the defendant obtained plaintiff's money by fraud or false color or pretense.

2 *Greenl. Ev.*, p. 100, § 120.

Or upon a consideration which has failed.

Chitty on Contr., 488.
Spring v. *Coffin*, 10 Mass., 34.

So money paid under a mistake of facts which includes ignorance of the laws of another State.

2 *Greenl. Ev.* p. 104, § 123;
Bank of Chillicothe v. *Dodge*, 8 Barb., 233;
Haven v. *Foster*, 9 Pick., 118.

Tested by these familiar principles, what doubt can be entertained here of the right to recover, and the admissibility of the evidence under the common counts?

The evidence established that Leland & Harbach were commission merchants in Chicago, and had been buying pork for the defendants, Ames & Co.

That on the 7th day of July, 1871, John L. Hancock delivered to Leland & Harbach 500 barrels of pork which had been theretofore bought for Ames & Co., at their request, and Leland & Harbach paid for the pork over

$8,000, by check on the Union National Bank. That the pork was shipped the same day to Ames & Co., at St. Louis, and *they received and sold the pork.*

That at the time the 500 bbls. of pork were received by Leland & Harbach, defendant Scudder was present at the office of Leland & Harbach, and consented to the receipt of said pork and *verbally authorized them to draw* on defendants for the amount due for the pork.

To the evidence in the preceding paragraph defendants objected, and this is the 5th error assigned.

That defendant, Scudder, on the said 7th day of July, 1871, *after* the drawing of the bill in question, stated he would *advise his firm of said bill by telegraph.*

Objected to and admitted, which is the 6th error alleged.

That the bill in question was on said 7th day of July, 1871, presented for discount at the Union National Bank by Leland & Harbach's clerk, and the Vice President of the Bank *declined to give Leland & Harbach credit for the bill without a bill of lading or other security.* That the clerk then returned to Leland & Harbach's office, and stated the Bank's objections, Scudder being present; and *in the presence and hearing of said defendant, Scudder*, the clerk was told by Leland or Harbach to return to the Bank and tell the Vice President that Mr. Scudder, one of the firm of Ames & Co., was then in Chicago, and had authorized the drawing of said draft, and *that it was drawn against 500 bbls. pork that day bought by Leland & Harbach*

for Henry Ames & Co., and duly shipped to them; that the clerk returned and made the statement as directed, and the Vice President, upon the faith of such statement that the bill was authorized by defendants, discounted said bill, the proceeds were passed to Leland & Harbach's credit, and the check given by Leland & Harbach to Hancock in payment of said pork, *was paid out of the proceeds of said draft.* Objected to and exception.

The bill and certificate of protest showing presentment for payment July 8th, 1871, and due protest for non-payment, were admitted in evidence, and to the admission *of the bill*, the defendant objected and excepted. This is the 7th error assigned.

That the bill had never been paid, and that Scudder telegraphed his firm on the evening of July 7th that the draft had been drawn and *to delay payment of "draft drawn against pork,"* and by a subsequent telegram directed them not to pay it.

Taking this evidence together, argument is unnecessary to maintain the correctness of the rulings of the court below.

Here was authority given to draw; promise to "advise," that is, direct payment; secret telegram to delay payment; receipt of consignment and its proceeds with knowledge; authorized statement to Bank and action of the latter *solely* upon such statement; the consignment paid for *out of money* obtained by the discount of the bill; fraudulent direction *not* to pay, and refusal of payment; direct damage to the Bank in consequence of reliance on Mr. Scudder's statement.

The judgment is clearly correct upon the principles of equitable estoppel.

The evidence would have been manifestly competent and the verdict sustainable if there had been no other count than for money had and received.

VI.

The parts of the charge excepted to were strictly in accordance with the facts of the case, and the law applicable thereto.

It would be disgraceful to the administration of justice if a recovery could not be had under the state of facts supposed by the instructions, and which actually existed.

If the declaration had consisted of the common counts alone, the evidence admitted was competent and the charge correct.

VII.

There was a count for interest. The promise of the defendants was to pay on demand. Payment was not made and interest was recoverable.

This was so if recovery on the original consideration had alone been sought. The judgment includes no more, and in fact much less than the original consideration and interest.

VIII.

The case lies in brief compass. Mr. Scudder authorized the drawing of a draft on his firm against certain

pork, and permitted the statement to be made to the Bank as *the inducement* to discount the bill, that it was drawn by his authority. The Bank took the bill on the faith of that statement, and the money received from the Bank *paid for the pork.* Ames & Co., received and sold the pork, pocketed the proceeds, and refused to pay the consideration.

Ames & Co., are liable upon every ground, and the case is so palpably with the Bank that damages ought to be given for the delay upon this appeal.

Kepectfully submitted on behalf of Defendant in Error.

MELVILLE W. FULLER,
Attorney and of Counsel.